FILED
99 479 SEP 20 1999
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

ELIZAPHAN NTAKIRUTIMANA,

Petitioner,

v.

JANET RENO, as Attorney General
of the United States;
MADELEINE ALBRIGHT, as Secretary
of State of the United States; and
JUAN GARZA, as Sheriff of Webb
County, Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ramsey Clark
Counsel of Record

Lawrence W. Schilling
36 East 12th Street
New York, NY 10003
(212) 475-3232
Attorneys for Petitioner

19588

Questions Presented

1. Whether extradition in the absence of a treaty violates Article II, Section 2, cl. 2 of the Constitution, impairs separation of powers and constitutional checks and balances in the vital field of foreign relations and risks entangling executive agreements on fundamental foreign policy issues without observing constitutional requirements for ratification.

2. Whether the "totality of the circumstances" federal probable cause standard requires rejection of the judicially developed rules that purport to set separate and independent requirements and criteria for assessing probable cause in extradition cases.

3. Whether the Charter of the United Nations authorizes the Security Council to establish any criminal court.

4. Whether the International Criminal Tribunal for Rwanda established pursuant to Security Council Resolution adopted in November 1994 is capable of protecting fundamental rights of accused persons which are guaranteed by the Constitution of the United States and international law.

Table of Contents

Questions Presented i

Table of Contents ii

Table of Cited Authorities vi

Opinions Below 1

Basis for Jurisdiction 1

U.N. Resolution, Surrender Agreement and Statute Involved 1

Statement of the Case 2

Reasons for granting the writ 4

I. Extradition in the Absence of a Treaty Violates Article II, Section 2, cl. 2 of the Constitution, Impairs Separation of Powers and Constitutional Checks and Balances in the Vital Field of Foreign Relations and Risks Entangling Executive Agreements on Fundamental Foreign Policy Issues Without Observing Constitutional Requirements For Ratification 4

1. The Text and Structure of the Constitution Require a Treaty for Extradition 6

2. Those Who Wrote and Those Who Ratified the Constitution Intended That International Extradition Be Governed Exclusively by Treaty 10

3. International Extradition by the United States Has Always Been Based on Article II Treaties 12

II. The "Totality of the Circumstances" Federal Probable Cause Standard Requires Rejection of the Judicially Developed Rules That Purport to Set Separate and Independent Requirements and Criteria for Assessing Probable Cause in Extradition Cases 17

III. The Charter of the United Nations Does Not Authorize the Security Council to Establish Any Criminal Court and the International Tribunal for Rwanda Is Not Capable of Protecting Fundamental Rights of Accused Persons Which Are Guaranteed by the Constitution of the United States and International Law 21

1. The Charter of the United Nations Does Not Authorize the Security Council to Establish Any Criminal Court 21

2. The International Criminal Tribunal for Rwanda Is Not Capable of Protecting Fundamental Rights of Accused Persons Which Are Guaranteed by the Constitution of the United States and International Law 26

Conclusion 30

Appendix

Decision of the Court of Appeals, August 5, 1999 as revised August 23, 1999 . . . . . A-1

Majority Opinion, Emilio M. Garza, C.J. A-2

Concurring Opinion, Robert M. Parker, C.J. A-21

Dissent Harold R. DeMoss, C.J. A-22

Order Denying Petition for Writ of Habeas Corpus, November 30, 1998, John D. Rainey, D.J. A-40

Opinion and Order Upholding Request for Surrender August 5, 1998, John D. Rainey, D.J. A-43

Memorandum and Order Denying Request for Surrender December 17, 1997, Marcel C. Notzon, M.J. A-113

U.N. Resolution 955 (1994) A-127
with Statute annexed A-129

Agreement on Surrender between the
United States and the ICTR
January 24, 1995 ..... A-145

Statute Implementing Agreement
§1342, Pub.L. 104-106 Div.A Title XIII
February 10, 1996 ..... A-150

Table of Cited Authorities

Cases

Arnbjornsdotter-Mendler v. U.S.
721 F.2d 679 (9th Cir. 1983) 22

B. Altman, Co. v. U.S.,
224 U.S. 583 (1911) 8

Boos v. Barry,
485 U.S. 312 (1988) 27

Castro Bobadilla v. Reno,
826 F.Supp. 1428, 1433 (S.D.Fla. 1993),
aff'd. 28 F.3d 116 (11th Cir. 1994) 17

Cherokee Nation v. Georgia,
30 U.S. 1 (1831) 13

De Geofroy v. Riggs,
133 U.S. 252 (1890) 7

Dred Scott v. Sandford,
60 U.S. 393 (1857) 30

Edmond v. U.S.,
137 L.Ed.2d 917 (1997) 9

Foster v. Neilson,
27 U.S. 253 (1829) 13

Freytag v. Commissioner,
501 U.S. 868 (1991) 10

Gallina v. Fraser,
278 F.2d 77 (2d Cir. 1960) 22

Grin v. Schine,
187 U.S. 181 (1902) 15

Holden v. Joy,
84 U.S. 211 (1872) 7

Illinois v. Gates,
462 U.S. 213 (1983) 18

Marbury v. Madison,
5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803) 24

Neely v. Henkel
180 U.S. 109 (1901) 15

Extradition of Reggie Anny Okeke,
1996 U.S.Dist. LEXIS 22379,
No. 96-701a P-01, 1996 WL 622213 (D.N.J. 1996) ... 19

In re Extradition of Sandhu,
No. 96-10635 (5th Cir. opinion filed June 11, 1996) ... 22

Reid v. Covert,
354 U.S. 1, (1957) 27

Sidali v. INS,
107 F.3d 191 (3d Cir. 1997) 17

Sindona v. Grant,
619 F.2d 167 (2d Cir. 1980) 17

Terlinder v. Ames,
184 U.S. 270 (1902) 16

United States v. Schooner Peggy,
5 U.S. 103 (1801) 12

U.S. v. Kin-Hong,
110 F.3d 103 (1st Cir. 1997) 20

Valentine v. U.S.,
299 U.S. 1 (1936) 6, 15

Worcester v. Georgia,
31 U.S. 515 (1832) 13

United States Constitution

Article I
Sec. 8 ..... 6, 7, 15
Sec. 10 12
cl. 1 8
cl. 3 8

Article II 21
Sec. 2 7
Sec. 2, cl. 2, the Treaty Clause 5, 6, 9
Sec. 2, cl. 2, the Appointments Clause 9

Article IV
Sec. 2, cl. 2 8
cl. 3 8

Article VI
cl. 2, the Supremacy Clause 12

Fifth Amendment 21, 27
Sixth Amendment 27
Eighth Amendment 27
Thirteenth Amendment 8

Statutes

18 U.S.C. §652 15

18 U.S.C. §1384 16

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 3

28 U.S.C. §3181 3

28 U.S.C. §3184 14

28 U.S.C. §3185 15

§1342 of Pub.L. No. 104-106 (1996) 2

Rules

Sup.Ct.R. 13.1 1

Treaties

The Jay Treaty (1783) 13

The Webster Ashburton Treaty (1842) 14

Paris Peace Treaty (1898) 16

Peace Treaty of 1783 14

United Nations Documents

Charter of the United Nations ..... passim

International Covenant on Civil and Political Rights 27

Universal Declaration of Human Rights 25, 27

U.N. Res. 955 (1994) ..... passim

U.N. Statute implementing the Agreement on Surrender ..... passim

Agreement on Surrender of Persons ..... passim

Conventions

The Genocide Convention 7, 27

The Geneva Convention 27

The Hague Convention 7

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment 27

Convention on the Prevention and Punishment of Crime of Genocide 27

Vienna Convention on Diplomatic Relations 27

Other Authorities

The Federalist Papers 11, 12

Thomas A. Bailey,
A Diplomatic History of the American People,
Appleton Century-Crofts, Third Edition (1946) 13

Mohammed Bedjaoui,
The New World Order And The Security Council,
Dortrecht (1994) 24

E.S. Corwin,
Constitution of the United States of America:
Analysis and Interpretation,
the Library of Congress, 1987 edition 17

Henry Steele Commanger (editor),
Documents of American History,
Appleton Century Crofts, Sixth Edition (1958) 14

John Foster Dulles,
War or Peace (1950) 24

Madison's Notes,
Documents Illustrative of the Formation of
the Union of the American States,
69th Congress, 1st session, House Doc. No. 398,
Government Printing Office (1927) 10

John Quigley,
The Rule of Non-Inquiry and Human Rights Treaties,
45 Catholic U.L.Rev. 1213 (1996) 22

David Schaffer,
International Judicial Intervention, Foreign Policy,
Spring 1996 21

Michael P. Scharf,
Results of the Rome Conference for an International
Criminal Courts,
U.S. Department of State, August 1998 22

Telford Taylor,
The Anatomy of the Nuremberg Trials,
Little, Brown and Co. (1992) 24

Laurence H. Tribe,
Taking Text and Structure Seriously;
Reflections on Free-Form Method in Constitutional
Interpretation, 108 Harv.L. Rev. 1221 (1995) 10

The ICJ Adopts A Draft Statute for an International
Criminal Court,
89 Am.J.Int'l.L. 404 (1995) 25

Report of the Committee of Detail
August 6, 1787 10

Restatement (Third) Of Foreign Relations Law (1986) . . 17

Report, Amnesty International,
"Trials and Tribulations," April 30, 1998 29

Opinions Below

The opinion of the Court of Appeals, A-1, is not yet officially reported and is unofficially reported at 1999 U.S. App. LEXIS 18253. The order of the District Court denying petitioner's application for a writ of habeas corpus, A-40, is unreported. The opinion and order of District Judge Rainey upholding the second request for surrender, A-43, is unofficially reported, 1998 U.S.Dist. LEXIS 22173. The memorandum and order of Magistrate Judge Notzon denying the first request for surrender is reported, 988 F.Supp. 1038.

Basis for Jurisdiction

The judgment sought to be reviewed was entered on August 5, 1999. The jurisdiction of this Court is based on 28 U.S.C. §1254(1). The petition is timely filed pursuant to Sup.Ct.R. 13.1.

U.N. Resolution, Surrender Agreement and Statute Involved

The Appendix sets forth U.N. Res. 955 (1994) establishing the ICTR, A-127, with Statute annexed, A-129, the Agreement on Surrender between the United States and the ICTR, A-145, and the U.S. statute implementing the Agreement, A-150.

Statement of the Case

In September 1996 the government initiated proceedings in the federal district court in Laredo, Texas seeking the surrender of petitioner, Pastor Eliel Ntakirutimana, to the International Criminal Tribunal for Rwanda, an ad hoc body created by a U.N. Security Council resolution adopted in November 1994, to stand trial on two indictments returned in June and September 1996, charging him with the commission of genocide and other serious crimes in Rwanda in 1994. The request was made under an agreement the Tribunal had entered into with the United States. A-145, and a statutory provision, Sec. 1342 of Pub.L. No. 104-106 (1996), implementing the agreement, A-150. There was no extradition treaty authorizing the surrender.

Petitioner was taken into custody at the government's request. The case was assigned to Magistrate Judge Marcel C. Notzon. Following extensive written submissions Judge Notzon denied the request and ordered petitioner's immediate release, A-113, 988 F.Supp. 1038 (S.D.Tex. 1997), holding that the Court lacked jurisdiction to order surrender in the absence of a valid extradition treaty, id. at 1040-42, and that the declaration of an investigator, a policeman from the Netherlands temporarily assigned to the Tribunal, filed in support of the request, was insufficient to establish probable cause, id. at 1042-44.

Upon his release petitioner lived with his wife and family in Laredo where he had been openly living as a legal permanent resident prior to his arrest.

The government did not appeal Judge Notzon's dismissal of the request, but rather refiled the request supplemented by one declaration by a Tribunal trial attorney, in the same federal court in Laredo, as it had publicly made known beforehand it would do. S

Petitioner was again taken into custody. The case was assigned to District Judge John D. Rainey. Petitioner was released on bond for surgery and then recuperated in the home

of a son who is a doctor practicing in Laredo. Judge Rainey received extensive submissions from the parties, including a second declaration by the Tribunal's investigator which had not been filed as part of the Tribunal's second request, taking up issues of sufficiency and credibility raised by Judge Notzon's decision and questions petitioner raised about the execution and veracity of the first declaration. After hearing oral argument, Judge Rainey upheld the request for surrender on August 5, 1998, and ordered Pastor Ntakirutimana returned to custody, ruling that the matter was properly before the Court as a second request for surrender, that the Agreement and statute together provided a constitutional basis for petitioner's surrender not withstanding the absence of an extradition treaty and that the government's submissions were sufficient to establish probable cause. A-43.

Petitioner filed a petition in the federal court in Laredo for a writ of habeas corpus to review Judge Rainey's decision together with a motion requesting that the petition be assigned to a judge other than Judges Notzon or Rainey. This motion was denied by the district court's Chief Judge and the habeas proceeding was assigned to Judge Rainey, who denied the petition in an order dated November 30, 1998, briefly reiterating the grounds of his previous decision, A-40. The judgment entered on this order dismissing the petition was appealable under 28 U.S.C. §1291.

Judge Rainey granted a stay pending the timely filing of an appeal and following such filing the Court of Appeals granted a stay pending appeal and ordered the appeal to be expedited. The Court of Appeals issued its decision eight months later on August 5, 1999, A-1. There were three opinions. The majority opinion upheld the constitutionality of petitioner's extradition in the absence of a treaty, and the sufficiency of the evidence to support probable cause and lifted the Court's stay. The dissent deemed the extradition unconstitutional. A-22. Judge Parker concurred in the majority opinion which he said was "well written" and "faithfully adheres to controlling jurisprudence." However, he

urged the Secretary in deciding whether petitioner should be surrendered to the Tribunal to closely scrutinize the underlying evidence which he pointed out was highly suspect and of questionable credibility, and added: "based on all the information in this record, viewed from the perspective of a judge who has served fifteen years on the trial bench and five years on the court of appeals,... I am persuaded that it is more likely than not that Ntakirutimana is actually innocent." A-21.

Petitioner moved for a stay of his surrender, which the Court of Appeals denied, 2-1. Petitioner then applied for a stay to Justice Antonin Scalia, as Circuit Justice. The government was directed to respond. The Solicitor General filed a response on August 19, 1999, rendering the stay application moot, stating that the United States would withhold action on petitioner's surrender for 30 days and pending action on his petition for certiorari, provided the petition was filed within 30 days. This petition is being filed within the 30 day period.

Reasons for granting the writ

I. Extradition in the Absence of a Treaty Violates Article II, Section 2, cl. 2 of the Constitution, Impairs Separation of Powers and Constitutional Checks and Balances in the Vital Field of Foreign Relations and Risks Entangling Executive Agreements on Fundamental Foreign Policy Issues Without Observing Constitutional Requirements For Ratification

The U.N. Security Council, in its resolution creating the International Criminal Tribunal for Rwanda (ICTR) directed that all Member nations "... shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute..." S.C. Res. 955, para. 2 (1994). A-128. The Secretary of State,

contrary to uniform historic practice over two centuries, chose for the first time to seek authorization for surrender of persons within the U.S. to a foreign body, the ICTR, by executive agreement. An "Agreement on the Surrender of Persons" between the U.S. and the ICTR, signed by the U.S. Ambassador to the Netherlands purports to fulfill the requirement of S.C.Res. 955.

Thereafter, by floor amendment to the National Defense Authorization Act for FY 1996, a 150 year old statute which provides procedures for use of surrender requests under existing extradition treaties, 18 U.S.C. §3181 et seq., was made to apply to the surrender requests of persons to the ICTR and the earlier ad hoc International Criminal Tribunal for Former Yugoslavia. There was no committee consideration, no reports, no debates. In this fashion the amendment "got slipped into law through the back door, without any public discussion or debate about its substantive merits." DeMoss, CJ dissenting. A-27.

The government has adamantly insisted in the Court of Appeals below "Nor does the Constitution prefer treaties over statutes as the legal source of extradition." Brief for Appellees, p. 16.

The steady growth in the use of executive agreements since World War II, while largely involving foreign aid and trade issues, creates an increasing danger that the protections placed in the Constitution to prevent improvident foreign agreements by requiring treaty ratification by two thirds of the Senate in the Treaty Clause are being eroded and that harmful entangling executive agreements in fundamental foreign policy issues will be made without observing constitutional requirements for ratification.

The majority opinion below fails to address the clear text and structure of the Treaty Clause which made it the exclusive means of entering agreements with foreign powers on traditional treaty subject matter. It ignored the clear intent of the delegates, expressed in Committee reports, amendments and debates, that the Treaty Clause be the sole means of

making international agreements concerning major international political issues. Two hundred years of constant use of treaties to achieve extradition, supported by Congressional procedures to implement extradition by treaty was brushed aside by the Court of Appeals which relied primarily on dicta in Valentine v. U.S., 299 U.S. 1 (1936) which it misunderstood.

The majority opinion below, if not reviewed, will further embolden the President to enter into secret agreements with foreign powers arbitrarily endangering the United States in violation of the Constitution, an end its authors were determined to prevent by the Treaty Clause.

1. The Text and Structure of the Constitution Require a Treaty for Extradition

Article II, Section 2, cl. 2 provides the President "... shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;...." It was a power of enormous concern and consequence to a small insecure young nation newly independent and much in need of a treaty with Great Britain.

The Treaty power was coupled by a semi-colon with the power, also with the Advice and Consent of the Senate to "... appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court... and all other Officers of the United States..." whose Appointments are not otherwise provided for in the Constitution. Congress was authorized by the same clause to provide for Appointments of inferior Officers... by the President alone, the Courts of Law, or the Heads of Departments."

Only the President is delegated power with approval of the Senate to make treaties by the Constitution. Unlike the powers delegated Congress which are specified, primarily in Article I, Section 8, the treaty power in the Constitution "is in terms unlimited, except by those restraints which are found in that instrument against the actions of the government or its

departments, and those arising from the nature of the government itself and that of the states." De Geofroy v. Riggs, 133 U.S. 252, 267 (1890). Because "the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiations and treaty if not inconsistent with the nature of our government and the relations between the States and the United States." Holden v. Joy, 84 U.S. 211, 242-43 (1872).

The potential for conflict between treaties whose subject matter might overlap powers delegated to the Congress, or the Judiciary was recognized from the beginning. As examples, both Congress acting pursuant to Article I, Sec. 8, and the President, in the exercise of his treaty power might seek "to lay and collect.. Duties..." on foreign imports, or "to regulate Commerce with foreign Nations." Jefferson believed that powers delegated to the Congress were excepted from the treaty making power.

President Taft, later Chief Justice, objected to the provisions of the Hague Convention of 1907 which authorized appeals from courts of the United States to the International Prize Court on the ground that the Executive did not have the power under Article II, Section 2 to authorize appeals from U.S. courts with Article III powers to an international tribunal. The U.S. ratified the treaty with a special protocol precluding such appeals. In November 1988, the United States affirmed that it could not participate in an international tribunal, except by treaty. Understanding (5) to the U.S. ratification of the Genocide Convention sets forth the following reservation:

> (5) That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into

specifically for that purpose with the advice and consent of the Senate.

Article I, Section 10, cl. 1 provides "No State shall enter into any Treaty, Alliance, or Confederation;..." This gives full Constitutional recognition to the exclusive national character of the treaty power.

However, Article I, Section 10, cl. 3 provided "No State shall, without the Consent of Congress... enter into any Agreement or Compact with... a foreign Power," thus recognizing that there are lesser international agreements not dealing with subjects which are appropriate only for a treaty. Such subject matter would seem to fall outside the requirements of the Article II treaty making power, as well as the prohibition of Article I, Sec. 10, cl. 1, since agreements concerning such subjects are not a treaty as intended by Article II, Section 2, cl. 2, or Article I, Section 10, cl. 1 if the word treaty means the same thing in both usages.

The authority to make international agreements concerning subject matter where Article II treaties are not required has been recognized many times by the Courts as an inherent Executive power. See, e.g., B. Altman, Co. v. U.S., 224 U.S. 583, 601 (1911)("commercial agreement... not... possessing the dignity of one requiring ratification of the Senate.").

The only explicit reference to extradition in the Constitution appears in Article IV where Section 2, cl. 2 provides for interstate surrender of persons charged with crime in one state and found in another. Until repealed by the Thirteenth Amendment, Article IV, Section 2, cl. 3 required deliverance of runaway slaves to their masters by a State to which they escape.

Both clauses demonstrate an intention by the Founders to establish duties concerning interstate extradition in the Constitution to avoid future conflicts over the issue. The potential for conflict was at least as great concerning international extradition and the Founders, unable to impose duties on foreign nations, delegated the exclusive power to

make treaties for extradition to the President with approval of 2/3s of the Senate.

Extradition by and to the United States has always been accomplished pursuant to a treaty from the earliest years of the Constitution. No Court has ever questioned that extradition was at the time the Constitution was signed and ratified and has been ever since regarded as clearly among "the proper subjects of negotiations and treaty." The issue of surrender by one nation of a person lawfully residents on its soil to another nation has been a significant act of sovereignty and a vital part of foreign relations since, at least, Athens demanded Helen of Troy. It also involves the fundamental individual rights to life and liberty.

From the text and structure of the Constitution it is clear that power to make treaties delegated in Article II is exclusive. Otherwise it is not only surplusage in a spare charter, but subjects the United States to conflicting claims of power between the Congress and the President concerning agreements with foreign powers over core issues of foreign policy like peace, alliances and surrender of persons and to claims that the President can enter into treaty subject matter agreements with foreign powers without Senate ratification.

In considering the provisions of the Appointments Clause, which are structurally identical to those of the Treaty Clause, are in the same paragraph, of the same Clause 2 of Article II, Section 2, separated only by a semicolon, this Court has held it "is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches." Edmond v. U.S., 137 L.Ed.2d 917, 928 (1997).

In an earlier Appointments Clause case, this Court held Congress and the Executive could not agree to accomplish appointments by other means. "Neither Congress nor the Executive can agree to waive this structural protection... The structural interests are not those of any one Branch of

Government but the entire republic." Freytag v. Commissioner, 501 U.S. 868, 880 (1991). Professor Lawrence Tribe, has observed Freytag's rationale "... applies equally to the Appointments Clause's neighbor, the Treaty Clause." See, Laurence H. Tribe, Taking Text and Structure Seriously; Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv.L. Rev. 1221 (1995), n. 179.

The exclusivity of the Treaty Clause preventing encroachment on the President's power over foreign relations by Congress and Presidential evasion of Senate approval of international treaties is no less significant a structural safeguard of the constitutional scheme.

2. Those Who Wrote and Those Who Ratified the Constitution Intended International Extradition to Be Governed Exclusively by Treaty

"The constitution's treaty procedure must be followed in order to ratify an extradition agreement which contractually binds our nation to respect obligations to another nation. The intent of the framers could not be clearer on this point." Ntakirutimana v. Reno, DeMoss, CJ, dissenting, A-30.

The treaty making power was carefully considered in Philadelphia. See, e.g., Madison's Notes, Documents Illustrative of the Formation of the Union of the American States, 69th Congress, 1st session, House Doc. No. 398, Government Printing Office, (1927) See pp. 477, 547, 605-07, 683, 685, 688-90 et al.

In the August 6, 1787 Report of the Committee of Detail, which contained XXIII articles for consideration of the delegates, the Senate alone was delegated "power to make treaties, and to appoint Ambassadors and Judges of the Supreme Court" Id. at 477, IX, Sec. 1.

A proposed amendment by Gouverneur Morris would have retained the treaty making power in the Senate but required ratification "by a law," observing "Such treaties could

not be otherwise made." Id. at 606 (August 23, 1787), 689 (September 8, 1787). James Wilson proposed placing the treaty power in the President with the approval of Congress. Only Pennsylvania supported it. Id. at 683 (September 7, 1787).

There were strenuous objections to the 2/3s approval requirements as being excessive and permitting a minority to frustrate important international relations. "If two thirds are necessary to make peace, the minority may perpetuate war...." Id. at 685, 688-90 (September 7, 1797). James Madison, concerned for peace with Great Britain, urged an exception for peace treaties which should be made by the Senate alone without the concurrence of the President. Id. at 685. Madison, perhaps thinking of the conflict between the treaty making power and Congressional exercise of delegated powers, proposed dividing treaties into two "sorts," one made by the President with the concurrence of the Senate, the other requiring concurrence of the "whole legislature." Id. at 607.

The Convention never considered permitting the president alone to make treaties. The delegates' experience with King George III made that possibility unthinkable. The proposal for ratification by the Congress was also rejected overwhelmingly.

None of the proposals, or debates on the treaty making power in the Convention can be reconciled with the argument that treaty subject matter can be addressed in international agreements by the U.S. by any means other than a treaty. Every proposal at the Convention concerning treaty making intended an exclusive means. Neither the President nor the Congress, or the two combined are delegated power to make treaties.

The Federalist commentaries on the treaty making power confirm its exclusive nature. Hamilton supported the exclusive treaty making power in the President with the consent of the Senate by distinguishing it from the arbitrary sole power of the King of Great Britain over all foreign transactions. Federalist, No. 69 (Hamilton), Western

University Press, p. 467 (1961). See Federalist No. 66. Again, in Federalist No. 75 he argued it would be "utterly unsafe and improper to entrust that power to an elective magistrate of four years duration" Id. at 505. He argued vigorously against vesting the treaty making power in the Senate alone, as was originally proposed in the Convention. In opposition to placing the requirement of consent by the House of Representatives he pleaded, "accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, secrecy and dispatch, are incompatible with the genius of a body so variable and so numerous." Id. at 507.

There can be no doubt that the States that ratified the Constitution believed that the treaty making power was a national power vested exclusively in the President with the consent of the Senate. The States knew that they were prohibited from entering into any treaty, alliance or confederation by Article I, Sec. 10.

3. International Extradition by the United States Has Always Been Based on Article II Treaties

Chief Justice John Marshall dealt with the treaty making power throughout his three decades on the Supreme Court. As early as 1801 he authored an opinion recognizing the power under the Treaty Clause to make laws binding on the U.S. in which the Court held that self executing treaties repeal prior conflicting acts of Congress. United States v. Schooner Peggy, 5 U.S. 103 (1801). In a series of cases revealing the important and exclusive nature of the treaty making power, he wrote opinions holding that Article VI, clause 2, the Supremacy Clause, "adopted and sanctions the previous treaties with Indian nations, and consequently admits their rank among those powers who are capable of making treaties." Worcester v. Georgia, 31 U.S. 515 (1832); see

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Toward the end of his years on the Court, Chief Justice Marshall defined treaties and distinguished them from acts of Congress as a means of explaining the treaty making power, "A treaty is, in its nature, a contract between two nations, not a legislative act." Foster v. Neilson, 27 U.S. 253, 314 (1829).

The historically important and controversial Jay Treaty negotiated by Chief Justice John Jay for President Washington and consented to by the Senate in 1795 included a needed extradition agreement. Among urgent problems to be resolved, the 1783 Peace Treaty between the U.S. and Great Britain was being violated by British troops who remained on U.S. soil. So heated was the national debate and dangerous the consequences of Senate rejection that President Washington's support for the treaty has been called "... one of the wisest and most courageous acts of his life. ... The significant thing about the agreement is... that only eleven years after granting independence they (Great Britain) deigned to meet the United States on terms of equality and sign a pact of any description." See, A Diplomatic History of the American People, Thomas A. Bailey, Appleton Century-Crofts, p. 67, Third Edition (1946). The turbulent history of the Jay Treaty necessarily informed Marshall's view of the treaty power.

After the Jay Treaty was ratified by the Senate the House of Representatives debated whether appropriations required for the treaty to be effectuated were mandatory, or discretionary. Madison and Gallatin argued the House had complete discretion under its power over appropriations, but it was universally conceded that Congress must appropriate funds if the treaty provisions were to be executed. Of this debate Henry Steele Commanger wrote "The question of appropriations for carrying out the provisions of the Treaty raised a serious constitutional problem in the House. The appropriations were finally made, but only after one of the greatest political debates in American history." Documents of

American History, edited by Henry Steele Commanger, Appleton Century Crofts, Sixth Edition, 1958, p. 165. The entire debate acknowledged the exclusive treaty making power of the President with Senate consent.

In 1842, the Webster Ashburton Treaty with Great Britain negotiated by Daniel Webster serving Presidents Harrison and Tyler, included critically needed extradition provisions because of a "flood of fugitives" from the U.S. to Canada to replace the expired and inadequate provisions of the Jay Treaty. It is inconceivable that anyone in the Congress or the Executive Branch during this first half century believed extradition could have been achieved in any way other than by treaty.

When the Congress first enacted general legislation for processing extradition pursuant to treaties in 1848 it explicitly recognized that a treaty must authorize extradition. That statutory recognition endures to this day with the single exception of the statute authorizing use of the procedures previously prescribed by statute for extradition pursuant to treaty to the two ad hoc international criminal tribunals for Yugoslavia and Rwanda.

The statute now codified at 18 U.S.C. Sec. 3184, begins, "Whenever there is a treaty or convention for extradition between the United States and any foreign government..." This is Congressional recognition that the treaty making power is the exclusive means under the Constitution for agreeing with a foreign government to extradite fugitives. Failure of the Congress to legislate extradition in the numero[illegible] crises that have arisen over persons sought by, or requested of the U.S. over two centuries is further evidence. The statutory procedure for extradition under Article II treaties has remained constant for 150 years.

Congress enacted a statute on June 6, 1900, authorizing the return of any person who committed a specified offense in a "foreign country or territory, or any part thereof, occupied by or under the control of the United States"

who "flee from justice therein" to the United States on the request or requisition of the U.S. military governor, or other chief executive officer in control of the territory. Presently codified at 18 U.S.C. §3185, this statute was the authority on which the Supreme Court acted in Neely v. Henkel, 180 U.S. 109 (1901).

The Court found authority for the statute in "aid or execution" of the 1898 peace treaty of Paris between Spain and the U.S.: "The power of Congress to make all laws necessary and proper for carrying into execution as well as the powers enumerated in section 8 of Article I of the Constitution... includes the power to enact such legislation as is appropriate to give efficacy to any of stipulations which it is competent for the president by and with the advice and consent of the Senate to insert in a treaty with a foreign power." Neely v. Henkel at 122. (Harlan, J.).

The statute is cited in Valentine v. U.S., 299 U.S. 5, 9 (1936), as the one exception to the rule that Congress has not exercised power to extradite to a foreign country: "Whatever may be the power of Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory occupied by or under the control of the United States. Act of June 6, 1900, 18 U.S.C. §652. See Neely v. Henkel." Thus the one exception to exclusive Article II power over extradition was in "aid or execution" of a peace treaty and pursuant to powers delegated to Congress concerning the return and surrender to a U.S. military governor or other chief executive officer in foreign countries occupied by or under the control of the United States.

The Court below, as has the government throughout these proceedings, relies primarily on dicta in Valentine v. U.S., to find power in the President to extradite in the absence of a treaty. Valentine involved a request by France for the extradition of U.S. citizens under an existing extradition treaty between the U.S. and France. The treaty provided "Neither of the Contracting Parties shall be bound to deliver up its own

citizens or subjects...." Valentine, 299 U.S. at 7. The question before the Court was whether a U.S. citizen could be extradited.

The Court observed "... the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." Id. at 9. The Court found two sources of law which could authorize the executive to seize a person, Congressional enactment and the treaty making power. Acknowledging that the treaty did not authorize the arrest of U.S. citizens, the Court then looked for legislative authorization for the executive to make the arrest required to extradite. It found the statute implementing extradition treaties, now 18 U.S.C. §3184, was purely procedural and conferred no power independent of the terms of a treaty to seize a person. Id. at 10.

Valentine was addressing only the power of Congress to authorize the executive to surrender U.S. citizens under an existing treaty where the treaty itself failed to do so. Valentine only acknowledges the authority of Congress to empower the President to exercise discretion to arrest a citizen for extradition under an existing treaty where he is not authorized to do so by that treaty, or existing statute. It did not intend and did not say that Congress could authorize the President to extradite anyone in the absence of an extradition treaty.

The Court below tacitly acknowledges the strained nature of its holding by twice stating "Valentine indicates" but never suggesting Valentine "holds." See, A-10.

Valentine observed "The desirability... of providing for the extradition of nationals of the asylum state is not a substitute for constitutional authority." 299 U.S. at 8.

The Circuit Court's reliance on dicta in Grin v. Schine, 187 U.S. 181 (1902) and Terlinder v. Ames, 184 U.S. 270 (1902) is equally misplaced. Both cases involved extradition treaties, Terlinder with Prussia, Grin with Russia. The claim that "a historical understanding exists" that Congress has the

power to extradite by statute, A-12, is contrary to the uniform historical practice.

The Court of Appeals cites the pragmatic comments of the Restatement (Third) Of Foreign Relations Law, §303 cmt. e (1986) twice. A-7, 13. The Court argues "the treaty making power remains unaffected, because the President may still elect to submit a negotiated treaty to the Senate, instead of submitting legislation to Congress."

The statement of noted constitutional scholar E.S. Corwin, carried for decades in all editions of the annotated Constitution of the United States of America: Analysis and Interpretation, now more than 2300 pages, prepared by the Congressional Research Service of the Library of Congress, accurately states the law, at p. 508 in its 1987 edition:

> Again, Congress of itself could not provide for the extradition of fugitives from justice but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.

II. The "Totality of the Circumstances" Federal Probable Cause Standard Requires Rejection of the Judicially Developed Rules That Purport to Set Separate and Independent Requirements and Criteria for Assessing Probable Cause in Extradition Cases

The probable cause standard in extradition cases is identical to that used by courts in federal preliminary hearings. Sidali v. INS, 107 F.3d 191, 199 (3d Cir. 1997); Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980); Castro Bobadilla v. Reno, 826 F.Supp. 1428, 1433 (S.D.Fla. 1993), aff'd. 28 F.3d 116 (11th Cir. 1994).

As stated in this Court's seminal probable cause decision, Illinois v. Gates, 462 U.S. 213 (1983) the task of

determining probable cause "is simply to make a practical, commonsense decision whether, given all the circumstances... there is a fair probability that" the defendant committed the offenses under consideration. Factors such as "veracity," "reliability" and "basis of knowledge" should not be understood as separate and independent requirements, but rather "as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause'... " Id. at 230. "Probable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules." Id. at 232.

The probable cause provision in the Agreement under which petitioner's surrender is being sought, A-145, is entirely compatible with the Gates "totality of the circumstances" standard. Article 2.3 of the Agreement, A-146, provides in part:

> 3. A request for surrender of a person who is sought for prosecution shall also be supported... by information sufficient to establish there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested.

Gates was decided in 1983 and although virtually all federal law has long adhered to Gates, extradition law has not. Contrary to the "totality of the circumstances" standard, extradition case law is beset by many judicially created rules requiring some separate elements to be included and others excluded in determining probable cause. These rules antedate and are inconsistent with Gates and should be repudiated. The rules purport to limit and restrict the probable cause determination in extradition proceedings in ways that are difficult if not impossible to apply and make little if any sense. The rules are arbitrary, as for example, that the probable cause determination can take into account evidence that explains, but must exclude evidence that contradicts the proof offered

in support of surrender; that an extraditee's evidence must negate or obliterate such proof before it can be considered, that the credibility of the proof tendered in support of extradition is not open to question and that the proof supporting the request must be accepted as correct despite factors which strongly demonstrate its unreliability.

Indeed the government in this case went so far as to contend in the Court of Appeals that probable cause should be deemed established by accepting the government's evidence "on its face," G.Br. 29 see also 14.

The two diametrically opposed opinions on probable cause in this case illustrate the difference between practical, commonsense probable cause determinations based on the totality of the circumstances and determinations of probable cause that result from the application of the many stultifying extradition rules that hinder a sound appraisal of the evidence and a commonsense, practical finding as to probable cause.

Magistrate Notzon, evaluating the Tribunal's proof in its totality found it insufficient. Cf. Extradition of Reggie Anny Okeke, 1996 U.S.Dist. LEXIS 22379, No. 96-701a P-01, 1996 WL 622213 (D.N.J. 1996)(denying extradition request for lack of probable cause). Judge Rainey, in an analysis which applied rules constraining the full consideration of the totality of circumstances and ignored the probative force of the many factors which demonstrated the lack of reliability of the Tribunal's witness statements, deemed probable cause satisfied.

This case presents this Court with the opportunity to clear away the pre-Gates judicially developed rules that artificially hinder commonsense, practical probable cause determinations in extradition cases based upon the totality of the evidence standard.

These outmoded extradition rules have persisted despite changes in the mainstream of federal law with regard to probable cause as well as in the scope of review in habeas corpus proceedings, see U.S. v. Kin-Hong, 110 F.3d 103, 116-117 (1st Cir. 1997), observing that this Court "last

addressed the scope of a court's authority on habeas corpus review of a finding of extraditability in 1925,...." id. These rules have persisted unexamined by this Court since well before Gates.

The need for the commonsense practical approach of the "totality of the circumstances" standard is especially great, where, as in the present case, no documentary or physical evidence of guilt is being offered in support of the extradition request and the sole evidence against the extraditee are statements of purported witnesses located by undisclosed means the reliability of which is inherently highly suspect given the nature of the horrific events described in the statements and the circumstances under which the statements were obtained in the field years later in a highly politicized climate through interpreters who were not screened for competence or bias and did not attest to the accuracy of their work.

The application of erroneous and irrational rules and standards for determining probable cause in extradition cases raises issues of law of constitutional dimension which can and should be resolvable on habeas review by the district court and courts of appeals, and this Court. The review function is especially necessary and appropriate in cases like the present where the same judge conducted the initial extradition examination and habeas corpus review, in effect largely depriving the extraditee of the first level of review by habeas corpus, and the examining magistrate heard no live witnesses and conducted no evidentiary hearing.

Petitioner should not be surrendered to face a trial that will inevitably be unfair given his inability to obtain witnesses in Rwanda and elsewhere in East Africa and persuade them to travel to Arusha, Tanzania to undertake the hazardous role of a witness for the defense. Petitioner is entitled to a probable cause determination based on the totality of the circumstances under Gates, under the Agreement between the United States and the Rwanda Tribunal, and as a matter of due process of law.

III. The Charter of the United Nations Does Not Authorize the Security Council to Establish Any Criminal Court and the International Tribunal for Rwanda Is Not Capable of Protecting Fundamental Rights of Accused Persons Which Are Guaranteed by the Constitution of the United States and International Law

1. The Charter of the United Nations Does Not Authorize the Security Council to Establish Any Criminal Court

Relations between the United States and the United Nations is clearly a subject Article II of the Constitution empowers the President to conduct with the consent of the Senate. Relations between the United States and the United Nations are more than mere bilateral relations conducted by independent and sovereign nations, because the United States has a voice, a vote, a dominant role in the United Nations and an absolute veto in the Security Council and the United Nations Charter is a multinational treaty to which the United states is a party, making it a part of the Supreme Law of the Land subject to judicial review.

The United States is and has been the essential member of the U.N. The United States was the major party responsible for the creation by the Security Council of the ad hoc International Criminal Tribunals for Former Yugoslavia in 1993 and Rwanda in 1995. "The United States was at the forefront in creating both tribunals and continues to be their leading source of political, financial, personnel, logistical and information-sharing support." International Judicial Intervention, David Schaffer, Foreign Policy, Spring 1996. Mr. Schaffer is Ambassador at Large and Counsel in the U.S. Department of State for international criminal tribunals.

The Court of Appeals in a short discussion held these

issues of Security Council power to create criminal courts and incapacity of the ICTR to protect fundamental rights of the accused are "beyond the scope of habeas review." The court also relied on the rule of "non-inquiry." See, A-21. The several cases it cites all involved traditional extradition by treaty between two nations.

In challenges to the general adequacy of the legal and penal systems of a nation requesting extradition to protect fundamental rights the rule of judicial non inquiry is not absolute. See, e.g. Arnbjornsdotter-Mendler v. U.S. 721 F.2d 679, 683 (9th Cir. 1983); Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960); In re Extradition of Sandhu, No. 96-10635 (5th Cir. opinion filed June 11, 1996). See, The Rule of Non-Inquiry and Human Rights Treaties, John Quigley, 45 Catholic U.L.Rev. 1213 (1996).

The ICTR serves primarily to indict the Hutu population as genocidal murderers in the name of international law. After 1995, because of their political origin and the many failures and inadequacies in the two ad hoc international criminal courts "it became apparent that Rwanda would be the last ad hoc tribunal." See, e.g. Results of the Rome Conference for an International Criminal Courts, Michael P. Scharf, August 1998, attorney advisor, U.S. Department of State on the issue of a permanent international criminal court.

The history of the planning meetings, the preparations and instructions of the national delegations, particularly the five permanent Member nations of the Security Council which included the United States as the host country, the records of the drafting and the consideration of the Charter by the delegates, if we are to believe the public record, leave no room for doubt that there would never have been a United Nations if the Charter had included either expressly, or by implication, the power to create an international court of criminal justice. From the four power Dumbarton Oaks conferences in 1944 to the fifty nation conference at San Francisco during April through June 1945, which ratified the Charter as drafted and imposed by the U.S., Britain, China, France and Russia, there

was never any suggestion that an international criminal court would be authorized by the Charter or that the Charter would have been accepted by major powers if it was. Those nations were not prepared to risk subjecting their leaders, armed services and citizens to the possibility of prosecution by an international criminal tribunal in the aftermath of World War II.

The statement of purposes, the general framework created for the U.N. and the detailed provisions of the Charter with more than half a century of operations show the Security Council was never vested with power to create a criminal tribunal.

Pursuant to Article 13 of the Charter the General Assembly initiated studies for the creation of an International Criminal Court. It assigned such duties to its International Law Commission which worked on the project for years. The contemplation always was that such a court would be created by multinational treaty, or amendment to the U.N. Charter. The U.S., France, Great Britain and the U.S.S.R., which were also permanent members of the U.N., initiated, drafted and established the Charter of the International Military Tribunal (Nuremberg Charter) at London between late June 1945 and August 8, 1945 when it was signed. They acted completely independently of the U.N. The Nuremberg Charter referred to the declaration by the U.N. of an "intention that War Criminals shall be brought to justice" and provided that: "Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom." The Nuremberg Charter makes no reference to the International Court of Justice and claims no relationship to the U.N.

The prosecution of the defeated Axis leaders for crimes against peace, war crimes and crimes against humanity at Nuremberg ignored the U.N. completely and the U.N. made no protest. The permanent members of the Security Council and other membership of the U.N. would have vehemently opposed any power for the U.N. to create a permanent

criminal tribunal, or accepted such a tribunal under U.N. authority, or otherwise. See, generally, Telford Taylor, The Anatomy of the Nuremberg Trials, Little, Brown and Co. (1992).

If Security Council power to create the ICTR is accepted by member nations and their courts, there will be no limit on Security Council claims of power to selectively prosecute targeted peoples.

John Foster Dulles, in his memoir, War or Peace, in 1950 expressed the U.S. view of legal limitations on Security Council power. "The Security Council is not a body that merely enforces agreed law. It is a law unto itself... No principles of law are laid down to guide it, it can decide in accordance with what it thinks is expedient."

This remarkable view is even more remarkably confirmed by Mohammed Bedjaoui, President of the International Court of Justice in his book, The New World Order And The Security Council, Dortrecht (1994). He demonstrates that the Security Council has interpreted its powers as being above the law and beyond any system of legal limits. He writes that whatever the Security Council does is ipso facto legal. He observed that the Security Council has consistently rejected any limits on its powers.

The courts of the United States cannot permit enforcement of a request for the surrender of a person lawfully within the United States to a U.N. international criminal tribunal that is not authorized by the Charter. The U.N. Charter is a treaty to which the U.S. is a party. Its provisions are therefore a part of the Supreme law of the land. The ICTR is incapable of protecting constitutional rights and that tribunal was created at the insistence and by the will of the United States. Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803).

The seizure and attempted surrender of a person within the U.S. to the ICTR by the Executive is no more a political question left by the Constitution to the political branches than is an arrest and imprisonment by federal agents in the United

States without legal authority.

The General Assembly, which initiated the Universal Declaration of Human Rights, later authorized planning and drafting of a treaty to create a permanent International Criminal Court by the International Law Commission. See, James Crawford, The ICJ Adopts A Draft Statute for an International Criminal Court, 89 Am.J.Int'l.L. 404 (1995).

Widespread recognition of the failures of ad hoc tribunals, and the awareness of their essential selectivity, unfairness, and impotence helped push the movement for a permanent international criminal tribunal toward its major breakthrough. After years with little progress, advances in 1997 set the stage for the final agreement on a treaty creating the long desired tribunal.

The permanent International Criminal Tribunal approved by 120 nations in Rome in June 1998 offers an opportunity for a badly needed international criminal tribunal supported by nearly all nations with potential to develop power to perform its duties effectively, committed to and capable of assuring fair trials and protecting fundamental human rights equally for all under law. It is authorized by a multinational treaty in which individual nations commit to its purpose and functions by agreement in accordance with their domestic laws. The United States which was responsible for the two ad hoc tribunals, voted against the treaty, joined only by China, Libya, Iraq, Israel, Qatar and Yemen.

Chapter VII of the Charter on which the Security Council based its claim of authority to create the Tribunal for Rwanda is part of the war powers provisions of the Charter. Chapter VII vests in the Security Council discretion to take such "action by air, or land forces as may be necessary to maintain or restore international peace and security."

It cannot be authority for creating a judicial tribunal. Prosecutions under it become war by other means threatening political leadership, ethnic and national groups and individuals anywhere in the world whom the Security Council might choose to demonize and punish through a criminal tribunal. If

former Yugoslavia and Rwanda can be singled out for prosecution before an ad hoc tribunal why not the United States? If Courts of the United States recognize such power in the Security Council, what restraint, other than force, will protect Americans and others from usurpations of power by the Security Council?

Only Articles 39 and 41 in Title VII have been cited as relevant to a claim of authority to create a criminal court capable of imprisoning and executing individuals. Article 39 directs the Security Council to determine the existence of any threat, or breach of the peace, and to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42. If the power to create a court exists it must be found in the itemized list of authorized acts in Article 41.

Under Article 41 the Security Council may decide what measures not involving the use of armed force may be employed to give effect to its decisions. These measures may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The only existing methods under international law for creation of an international criminal tribunal are by a multinational treaty or Amendment to the U.N. Charter. Both the multinational treaty and amendment to the U.N. Charter have the important additional benefits of securing the express, considered and independent commitment of every Member, or signatory nation to the Court and its works.

2. The International Criminal Tribunal for Rwanda Is Not Capable of Protecting Fundamental Rights of Accused Persons Which Are Guaranteed by the Constitution of the United States and International Law

A treaty cannot violate constitutionally protected freedoms.

"The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." Reid v. Covert, 354 U.S. 1, 16-17 (1957).

In 1988, the Supreme Court, referring to the principle in Reid v. Covert "as well established," voided a statute of the District of Columbia which prohibited the display of any sign within 500 feet of a foreign embassy that tended to bring a foreign government into public odium or disrepute. The government argued the statute was intended to carry out treaty obligations and therefore justified by a compelling governmental interest, compliance with the Vienna Convention on Diplomatic Relations which requires the United States to protect the "dignity" of foreign missions. The Court held the statute was facially violative of the First Amendment and the treaty obligation must yield to the Constitution. Boos v. Barry, 485 U.S. 312 (1988).

A substantial body of evidence was presented below in the proceedings before the two successive hearing officers which establishes the incapacity of the ICTR to provide a fair trial, assure due process of law, protect the right to counsel, compel the appearance of witnesses for the defense, or protect the lives and safety of prisoners, or witnesses.

The evidence demonstrates the incapacity of the ICTR to protect rights guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution of the United States and fundamental rights under international law, as well. The ICTR is incapable of protecting rights guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment, the Convention on the Prevention and Punishment of Crime of Genocide, and international humanitarian law including the Hague and Geneva Conventions.

The incapacity of the ICTR to provide, or protect

fundamental rights of accused persons before it is clear. With its temporary and ad hoc nature, the most learned, experienced and effective jurists in the world could not overcome the difficulties of functioning in a remote area with judges, staff and counsel from different continents, cultures, systems of law, languages and personal experience all working without precedents, operational history, or prior practice. All the facilities of a Federal Judicial Center, Administrative Office for U.S. courts, National Judicial College, or major law schools would still require years to develop effective performance.

The lack of power to obtain evidence and witnesses free from the control of national governments engaged in life and death struggles and to assure defendants access to evidence so facts can be fairly determined would defeat the most valiant effort to do justice. There is no possibility of defendants obtaining evidence from within Rwanda where most witnesses and physical evidence are located. No one living in Rwanda would dare testify favorably for the defense in Arusha and return to Rwanda. There is little possibility of effectively cross examining witnesses for the prosecution from Rwanda, because they know there is little chance they can be impeached by witnesses or evidence from Rwanda, or investigated and prosecuted for perjury and that testimony supporting the defense would endanger them and their families.

The Tribunal has failed to protect witnesses for the defendants from execution in Rwanda and assassination in Kenya, among other places. The first person executed in Rwanda, Frodwald Karamira, from among 120,000 prisoners held since 1994, had been noticed by defendants as a defense witness before the ICTR. Subpoenas had been sought but were not issued by the Tribunal.

Seth Sindashanga, Minister of the Interior for the current Tutsi government in Rwanda in 1994 and 1995 was a key witness for many defendants. He was assassinated in Nairobi on May 16, 1998. He had been dismissed from the

government in Rwanda in 1995 for protesting the continuing murders of Hutus by Tutsi soldiers whom he identified and who were never arrested. Amnesty International urgently requested Kenya to make a full inquiry. Press clips, a letter of accused prisoners in Arusha expressing their grave concern to the ICTR and the AI report, were in the hearing record below in the appendix ("5th Cir. App.") at A37 to A50.

In February 1999, a brother and important witness for the accused Theoneste Bagosora was hacked to death in Cameroon which had earlier surrendered Bagosora. The pursuit and murders of prominent Hutus exiled from Rwanda has had an in terrorem effect on the entire Hutu diaspora making it difficult to obtain witnesses from outside Rwanda.

Among the prisoners in Rwanda are many more witnesses. The ICTR has failed to exercise its power to request Rwanda to defer to its competence, to save lives of persons denied fair trials in Rwanda, to save truth by protecting witnesses, or to save justice and its own reasons for existence, including reconciliation.

The Tribunal itself remains dysfunctional. Judge Lennart Aspergen, formerly the highest legal officer of Sweden, who sits on the ICTR, has repeatedly condemned its performance. On May 2, 1998, he called the ICTR record "miserable -- beneath contempt, actually." 5th Cir. App. at A51. U.N. Reports and investigations document the Tribunal's tribulations. The media has reported extensively on the Tribunal's dysfunction. Id. A 46 page report by Amnesty International on the ICTR dated April 30, 1998, subtitled "Trials and Tribulations," outlines many of the problems and shortcomings of this experiment in ad hoc criminal prosecutions. Id. 5th Cir. App. at A53- A100. The record below contains extensive evidence of the Tribunal's continuing incapacity and failures to protect fundamental rights. The existence of written protections of rights prescribed by the ICTR Statute and Rules, do not alter the Tribunal's powerlessness, or its practices which fail to conform to those principles.

The Tribunal has repeatedly prevented and frustrated choice of counsel and defendants have often had unwanted and ineffective representation. Accused persons in Arusha have continuously protested violations of their rights to counsel including by a hunger strike in late May 1998. See id. 5th Cir. App. at A24-A35.

If the issue of U.N. authority to create a criminal tribunal is non-justiciable in U.S. courts, where the executive has seized appellant to surrender him to an illegal Court which cannot provide, or protect fundamental rights, then the U.S. courts have surrendered their power to limit illegal U.N. actions compelling conduct by U.S. officials. The rule of law and protection for fundamental rights of people lawfully in the U.S. will be severely damaged. The consequences of such ruling, akin to Dred Scott v. Sandford, 60 U.S. 393 (1857), may be disastrous. At best the world will be in for a more lawless period.

Conclusion

The petition for writ of certiorari should be granted.

Dated: September 17, 1999

Ramsey Clark
Lawrence W. Schilling
36 East 12th Street
New York, NY 10003
(212) 475-3232

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ELIZAPHAN NTAKIRUTIMANA, Petitioner-Appellant,

versus

JANET RENO, Attorney General of the United States;
MADELEINE ALBRIGHT, Secretary of State of the United States;
JUAN GARZA, Sheriff of Webb County, Texas,
Respondents-Appellees.

No. 98-41597

August 5, 1999, Decided

SUBSEQUENT HISTORY: As Revised August 23, 1999.

DISPOSITION: AFFIRMED order of district court denying Ntakirutimana's petition for a writ of habeas corpus, and LIFTED stay of extradition.

JUDGES: Before EMILIO M. GARZA, DeMOSS, and PARKER, Circuit Judges. ROBERT M. PARKER, Circuit Judge, writing separately, special concurrence. HAROLD R. DeMOSS, Circuit Judge, dissenting.

OPINION BY: EMILIO M. GARZA

OPINION:

EMILIO M. GARZA, Circuit Judge:

Elizaphan Ntakirutimana appeals the district court's denial of his habeas corpus petition that challenged the district court's grant of a second request for surrender. He alleges that the district court erred because (1) the Constitution of the United States requires an Article II treaty for the surrender of a person to the International Criminal Tribunal for Rwanda ("ICTR" or "Tribunal"), [1] (2) the request for surrender does not establish probable cause, (3) the United Nations ("U.N.") Charter does not authorize the Security Council to establish the ICTR, and (4) the ICTR is not capable of protecting fundamental rights guaranteed by the United States Constitution and international law. We affirm.

Rwanda has been the source of ongoing ethnic conflict between members of the majority Hutu and minority Tutsi tribes. In April 1994, President Juvenal Habyarimana of Rwanda, a Hutu, was killed when his aircraft crashed due to an artillery attack. The crash triggered a wave of violence by the Hutus against the Tutsis, which resulted in the deaths of between 500,000 and one-million persons. Tutsi rebels triumphed over the Hutus, and the Tutsi-dominated government then requested the U.N. to create an international war crimes tribunal. An investigation by the U.N. established that the mass exterminations of the Tutsis--motivated by

---

[1] The full name of the Tribunal is: International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States. See National Defense Authorization Act, Pub. L. 104-106, § 1342(c)(2), 110 Stat. 486 (1996).

ethnic hatred--had been planned for months. The Security Council adopted Resolution 955, which created the ICTR to prosecute and to punish the individuals responsible for the violations in Rwanda and its neighboring states between January 1 and December 31, 1994. The Resolution directed that "all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute [of the ICTR]." [2] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1-2 (1994), reprinted in *33 I.L.M. 1598, 1601 (1994).*

In 1995, the President of the United States entered into an executive agreement with the ICTR, entitled the Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States ("Agreement"). The Agreement provided that the United States "agrees to surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal." *Agreement, art. 1, cl. 1, Jan. 24, 1995, U.S.-Int'l Trib. Rwanda, 1996 WL 165484,* at *1 (Treaty). In 1996, Congress enacted Public Law 104-106 to implement the Agreement. See National Defense Authorization Act, Pub. L. 104-106, § 1342, 110 Stat. 486 (1996). Section 1342(a)(1) of this legislation provides that the federal extradition statutes *(18 U.S.C. §§ 3181* et seq.) shall apply to the surrender of persons to the ICTR. Among the statutory provisions made applicable is *18 U.S.C. § 3184.* This section authorizes a judicial officer to hold a hearing to consider a request for surrender. If the

---

[2] The Statute of the ICTR, which is annexed to Resolution 955, and the Rules of Procedure and Evidence of the ICTR guide proceedings before the ICTR.

judicial officer finds the evidence sufficient to sustain the charges under the treaty or convention, then the officer certifies to the Secretary of State that the individual may be surrendered. See also *18 U.S.C. § 3186* (conferring final authority on the Secretary of State to order a fugitive's surrender where a judicial officer has ruled that the requirements for extradition have been met).

In June and September 1996, the ICTR returned two indictments against Pastor Ntakirutimana, charging him with the crimes of genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.[3] n3 At the time of the charges, Ntakirutimana, a Hutu, served as President of the Seventh Day Adventist Church for all of Rwanda. He was based in a church complex (the "Complex") in Mugonero, Gishyita Commune, Kibuye Prefecture, Rwanda, [4]n4 and was well known in the Complex and the community. The first indictment alleges that, following the beginning of the wave of violence in 1994, Ntakirutimana and other individuals prepared and executed a plan by which they encouraged large numbers of the local Tutsi population to seek refuge in the Complex. They separated the Hutus from the Tutsis and encouraged the Hutus to leave. Ntakirutimana then raised an armed mob of Hutus, led them to the Complex, and directed

---

[3] Article 2 of the Statute of the ICTR provides that the ICTR has the power to prosecute genocide, including complicity in genocide and conspiracy to commit genocide. Article 3 provides the ICTR with the power to prosecute crimes against humanity. Article 4 provides the ICTR with the power to prosecute serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto. See S.C. Res. 955, at 3-5.

[4] A "prefecture" is like a state, and a "commune" is like a county within a state.

the slaughter of the Tutsis who had sought shelter there. A Tribunal Judge confirmed the indictment and issued a warrant for Ntakirutimana's arrest.

The second indictment charges Ntakirutimana with conduct that occurred after the massacre at the Complex. The survivors of the attack fled to the Bisesero area of Kibuye Prefecture, Rwanda. The indictment alleges that Ntakirutimana drove armed Hutu soldiers into the Bisesero region, hunted for hiding Tutsis, and ordered the soldiers to kill them. A Tribunal Judge confirmed the second indictment and issued another warrant for Ntakirutimana's arrest.

Ntakirutimana has legally resided in Laredo, Texas since he left Rwanda in 1994. The ICTR requested that the United States extradite Ntakirutimana to the ICTR pursuant to the Agreement. In September 1996, the Government filed a request for Ntakirutimana's surrender to the ICTR in the Southern District of Texas. A Magistrate Judge, serving as the judicial officer, denied the Government's request for surrender. He held that Public Law 104-106 is unconstitutional because, based on historical practice, extradition requires a treaty. See *In re Surrender of Ntakirutimana, 988 F. Supp. 1038, 1042 (S.D. Tex. 1997)*. He held alternatively that the request for surrender, and the supporting documents, did not provide probable cause to support the charges. See *id. at 1044*.

To address the evidentiary issues raised by the Magistrate Judge, the Government added two declarations, and filed another request for surrender in the same court.[5] The district

---

[5] The government did not appeal the request, because extradition decisions are not appealable under *28 U.S.C. § 1291*. See *In re Extradition of Howard, 996 F.2d 1320, 1325 (1st Cir. 1993)* (explaining that the extradition judge is not acting in his capacity as an Article III judge, and thus the decision is not a decision of the "district court"). The government's remedy is to file another request. See,

court certified the surrender to the ICTR.[6] The court held that the Agreement and Public Law 104-106 provide a constitutional basis for the extradition of Ntakirutimana. Among other reasons, the court found that the Constitution sets forth no specific requirements for extradition, that the Supreme Court has indicated its approval of extraditions made in the absence of a treaty, and that there is precedent wherein fugitives were extradited pursuant to statutes that "filled the gap" left by a treaty provision. See *In re Surrender of Ntakirutimana, 1998 U.S. Dist. LEXIS 22173, No. CIV. A. L-98-43, 1998 WL 655708,* at *9, 17 (S.D. Tex. Aug. 6 1998). The court also held that the evidence sufficed to establish probable cause for the charges against Ntakirutimana. See id. at *30. Ntakirutimana filed a petition for a writ of habeas corpus under *28 U.S.C. § 2241.* The district court denied the petition, and Ntakirutimana has timely appealed.[7]

II

The scope of habeas corpus review of the findings of a judicial officer that conducted an extradition hearing is extremely limited. See *Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971).* We inquire only into (1)

---

e.g., *id. at 1325; Gusikoff v. United States, 620 F.2d 459, 461 (5th Cir. 1980).*

[6] The district court judge served as the judicial officer for the extradition proceeding. We recognize that the order issued by the judge is not an order of the "district court," yet we refer to it as such for simplicity.

[7] We granted a stay of extradition pending appeal.

whether the committing court [8] had jurisdiction, (2) whether the offense charged is within the treaty, and (3) whether the evidence shows a reasonable ground to believe the accused guilty. See *Fernandez v. Phillips, 268 U.S. 311, 312, 45 S. Ct. 541, 542, 69 L. Ed. 970 (1925); Garcia-Guillern, 450 F.2d at 1191.* A writ of habeas corpus in a case of extradition is not a means for rehearing the findings of the committing court. See *Fernandez, 268 U.S. at 312, 45 S. Ct. at 542; Oteiza v. Jacobus, 136 U.S. 330, 334, 10 S. Ct. 1031, 1032, 34 L. Ed. 464 (1890); Escobedo v. United States, 623 F.2d 1098, 1101 (5th Cir. 1980).*

III

Ntakirutimana alleges that Article II of the Constitution of the United States requires that an extradition occur pursuant to a treaty. It is unconstitutional, he claims, to extradite him to the ICTR pursuant to a statute in the absence of a treaty. Accordingly, he claims it is unconstitutional to extradite him on the basis of the Agreement and Pub. Law 104-106 (the "Congressional-Executive Agreement").[9] The district court concluded that it is constitutional to surrender Ntakirutimana in the absence of an "extradition treaty," because a statute authorized extradition. We review this legal issue de novo.[10]

---

[8] The judicial officer, whether state or federal, who is authorized to hold an extradition hearing pursuant to the terms of *18 U.S.C. § 3184* is often referred to as a "magistrate" or as the "committing court." See *Sayne v. Shipley, 418 F.2d 679, 685 n.15 (5th Cir. 1969).*

[9] See THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 303 cmt. e (1986) (describing Congressional-Executive agreements).

[10] We may review this issue because Ntakirutimana's challenge to the constitutionality of the

See *United States v. Luna, 165 F.3d 316, 319 (5th Cir. 1999)*, cert. denied, *U.S.* , *119 S. Ct. 1783, 143 L. Ed. 2d 811 (1999)* (reviewing constitutionality of extradition statute de novo).

To determine whether a treaty is required to extradite Ntakirutimana, we turn to the text of the Constitution. Ntakirutimana contends that Article II, Section 2, Clause 2 of the Constitution requires a treaty to extradite. This Clause, which enumerates the President's foreign relations power, provides in part that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." U.S. CONST. art. II, § 2, cl. 2. This provision does not refer either to extradition or to the necessity of a treaty to extradite. The Supreme Court has explained, however, that "the power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." *Terlinden v. Ames, 184 U.S. 270, 289, 22 S. Ct. 484, 492, 46 L. Ed. 534 (1902)* (citation omitted).

Yet, the Court has found that the Executive's power to surrender fugitives is not unlimited. In *Valentine v. United States, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936)*, the

---

statute, pursuant to which the district court issued the certification of extraditability, represents a challenge to the committing court's jurisdiction. See, e.g., *Manrique Carreno v. Johnson, 899 F. Supp. 624, 629 (S.D. Fla. 1995)* (construing constitutionality argument as a challenge to the committing court's jurisdiction).

Supreme Court considered whether an exception clause [11]in the United States's extradition treaty with France implicitly granted to the Executive the discretionary power to surrender citizens. The Court first stated that the power to provide for extradition is a national power that "is not confided to the Executive in the absence of treaty or legislative provision." *Id. at 8, 57 S. Ct. at 102.* The Court explained:

[The power to extradite] rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that the statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Id. at 9, 57 S. Ct. at 102.

The Court then considered whether any statute authorized the Executive's discretion to extradite. The Court commented that:

---

[11] The exception clause provided, "Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." *Valentine, 299 U.S. at 7, 57 S. Ct. at 102* (citations omitted). Historically, "where treaties have provided for the extradition of persons without exception, the United States has always construed its obligation as embracing its citizens." Id. (citation omitted). Exception clauses excuse a government from surrendering its own citizens.

Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory "occupied by or under the control of the United States." Aside from that limited provision, the Act of Congress relating to extradition simply defines the procedure to carry out an existing extradition treaty or convention.

Id. at 9, 57 S. Ct. at 102-03 (citations omitted). The Court concluded that no statutory basis conferred the power on the Executive to surrender a citizen to the foreign government. See *id. at 10, 57 S. Ct. at 103.* The Court subsequently addressed whether the treaty conferred the power to surrender, and found that it did not. See *id. at 18, 57 S. Ct. at 106.* The Court concluded that, "we are constrained to hold that [the President's] power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without the power to surrender the respondents." Id. The Court added that the remedy for this lack of power "lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens." Id.

Valentine indicates that a court should look to whether a treaty or statute grants executive discretion to extradite. Hence, Valentine supports the constitutionality of using the Congressional-Executive Agreement to extradite Ntakirutimana. Ntakirutimana attempts to distinguish Valentine on the ground that the case dealt with a treaty between France and the United States. Yet, Valentine indicates that a statute suffices to confer authority on the President to surrender a fugitive. See id. Ntakirutimana suggests also that Valentine expressly challenged the power of Congress, independent of treaty, to provide for extradition. Valentine, however, did not place a limit on Congress's power to provide for extradition. See *id. at 9, 57 S. Ct. at 102* ("Whatever may be the power of the Congress to provide for extradition independent of treaty . . ."). Thus, although some

authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor Valentine require that the authorization come in the form of a treaty.

Notwithstanding the Constitution's text or Valentine, Ntakirutimana argues that the intent of the drafters of the Constitution supports his interpretation. He alleges that the delegates to the Constitutional Convention intentionally placed the Treaty power exclusively in the President and the Senate. The delegates designed this arrangement because they wanted a single executive agent to negotiate agreements with foreign powers, and they wanted the senior House of Congress--the Senate--to review the agreements to serve as a check on the executive branch. Ntakirutimana also claims that the rejection of alternative proposals suggests that the framers believed that a treaty is the only means by which the United States can enter into a binding agreement with a foreign nation.[12]

We are unpersuaded by Ntakirutimana's extended discussion of the Constitution's history. Ntakirutimana does not cite to any provision in the Constitution or any aspect of its history that requires a treaty to extradite. Ntakirutimana's argument, which is not specific to extradition, is premised on the assumption that a treaty is required for an international agreement. To the contrary, "the Constitution, while expounding procedural requirements for treaties alone, apparently contemplates alternate modes of international agreements." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5, at 228-29 (2d ed. 1988) (explaining that Article 1, § 10 of the Constitution refers to other international devices that may be used by the federal government). "The Supreme Court has recognized that of necessity the President may enter into certain binding

---

[12]For example, Madison proposed making two types of treaties: one made by the President with the concurrence of the Senate, and the other requiring the concurrence of the whole legislature.

agreements with foreign nations not strictly congruent with the formalities required by the Constitution's Treaty Clause." *United States v. Walczak, 783 F.2d 852, 855 (9th Cir. 1986)* (citations omitted) (executive agreement). More specifically, the Supreme Court has repeatedly stated that a treaty or statute may confer the power to extradite. See, e.g., *Valentine, 299 U.S. at 18, 57 S. Ct. at 106; Grin v. Shine, 187 U.S. 181, 191, 23 S. Ct. 98, 102, 47 L. Ed. 130 (1902)* ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient." (citation omitted)); *Terlinden, 184 U.S. at 289, 22 S. Ct. at 492* ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision." (citation omitted)).

Ntakirutimana next argues that historical practice establishes that a treaty is required to extradite. According to Ntakirutimana, the United States has never surrendered a person except pursuant to an Article II treaty, and the only involuntary transfers without an extradition treaty have been to "a foreign country or territory 'occupied by or under the control of the United States.'" *Valentine, 299 U.S. at 9, 57 S. Ct. at 102.* This argument fails for numerous reasons. First, Valentine did not suggest that this "historical practice" limited Congress's power. See *id. at 9, 57 S. Ct. at 102-03.* Second, the Supreme Court's statements that a statute may confer the power to extradite also reflect a historical understanding of the Constitution. See, e.g., *id. at 18, 57 S. Ct. at 106; Grin, 187 U.S. at 191, 23 S. Ct. at 102; Terlinden, 184 U.S. at 289, 22 S. Ct. at 492.* Even if Congress has rarely exercised the power to extradite by statute, a historical understanding exists nonetheless that it may do so. Third, in some instances in which a fugitive would not have been extraditable under a treaty, a fugitive has been extradited pursuant to a statute that "filled the gap" in the treaty. See, e.g., *Hilario v. United States, 854 F. Supp. 165 (E.D.N.Y. 1994)* (upholding extradition pursuant to a post-Valentine statute that granted

executive discretion to extradite). Thus, we are unconvinced that the President's practice of usually submitting a negotiated treaty to the Senate reflects a historical understanding that a treaty is required to extradite.

We are unpersuaded by Ntakirutimana's other arguments. First, he asserts that the failure to require a treaty violates the Constitution's separation of powers. He contends that if a treaty is not required, then "the President alone could make dangerous agreements with foreign governments" or "Congress could legislate foreign affairs." This argument is not relevant to an Executive-Congressional agreement, which involves neither the President acting unilaterally nor Congress negotiating with foreign countries. Second, Ntakirutimana argues that "statutes cannot usurp the Treaty making power of Article II." The Supreme Court, however, has held that statutes can usurp a treaty. This is confirmed by the "last in time" rule that, if a statute and treaty are inconsistent, then the last in time will prevail. See, e.g., *Whitney v. Robertson, 124 U.S. 190, 194, 8 S. Ct. 456, 458, 31 L. Ed. 386 (1888)* ("if the two are inconsistent, the one last in date will control the other"). This rule explicitly contemplates that a statute and a treaty may at times cover the same subject matter. Third, Ntakirutimana contends that not requiring a treaty reads the treaty-making power out of the Constitution. Yet, the treaty-making power remains unaffected, because the President may still elect to submit a negotiated treaty to the Senate, instead of submitting legislation to Congress. See THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 303 cmt. e (1986) ("Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty."). Thus, we conclude that it is not unconstitutional to surrender Ntakirutimana to the ICTR pursuant to the Executive-Congressional Agreement.

IV

Ntakirutimana contends next that the district court erred in dismissing his habeas petition because the request for surrender fails to establish probable cause. The Agreement with the ICTR requires that the Tribunal present "information sufficient to establish that there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested." *Agreement, art. 2, cl. 3, 1996 WL 165484,* at *1. This requirement is designed to meet our constitutional "probable cause" standard in reviewing the sufficiency of the evidence in extradition proceedings. In reviewing a request for surrender, the committing court must determine whether probable cause exists to sustain the charges against the accused. See *Collins v. Loisel, 259 U.S. 309, 314-15, 42 S. Ct. 469, 471, 66 L. Ed. 956 (1922); Escobedo, 623 F.2d at1102.* Our function on habeas review "is to determine whether there is any competent evidence tending to show probable cause. The weight and sufficiency of that evidence is for the determination of the committing court." *Escobedo, 623 F.2d at 1102* (quotations and citations omitted); cf. *Quinn v. Robinson, 783 F.2d 776, 791 (9th Cir. 1986)* ("Because the magistrate's probable cause finding is thus not a finding of fact 'in the sense that the court has weighed the evidence and resolved disputed factual issues,' it must be upheld if there is any competent evidence in the record to support it." (citations omitted)).

The evidence at the extradition hearing consisted of several documents, all of which were admissible. [13]Along with the first

---

[13] There is no dispute that all three declarations have been properly authenticated by either the Ambassador of the United States at Kigali, Rwanda (where the office of the Prosecutor for the Tribunal is located), or the Ambassador of the United States to the Netherlands (where the Tribunal's Prosecutor is based). The authentication renders the documents admissible under *18 U.S.C. § 3190.*

request for surrender, the Government included a declaration from Arjen Mostert, who served for six months as a Tribunal investigator. Mostert obtained the declarations of twelve witnesses, labeled A-L to protect their identities, who survived the Mugonero and Bisesero massacres. Mostert declared that the witnesses were ordinary citizens and did not receive consideration for their testimony. The witnesses, all of whom were familiar with Ntakirutimana, described seeing him at the massacre or leading the soldiers in search of Tutsis at Bisesero.[14] The witnesses' statements corroborated one another, and many of the witnesses positively identified a photograph of Ntakirutimana. When the Magistrate Judge denied the first request for surrender, he found Mostert's affidavit alone insufficient to provide probable cause to support the charges.

The second indictment, which involves the events following the Complex massacre, is based on evidence from five witnesses. Witness C saw Ntakirutimana arrive at a Complex where Tutsis were hiding, and he heard Ntakirutimana tell soldiers to "take off the roof from this church so it cannot be used anymore as a hiding place for these dogs." Witness H corroborated Witness C's recount. Witness I saw Ntakirutimana shoot at Tutsis.

The Appendix to the district court's opinion also provides summaries of the witnesses' statements. See *Ntakirutimana*,

---

See *18 U.S.C. § 3190* (authentication requirement).

[14] The first indictment is based on evidence from nine witnesses, four of whom knew Ntakirutimana personally. Witnesses B, C, H, and I saw Ntakirutimana among the armed attackers at the Complex massacre. Witness H heard Ntakirutimana say "kill them all" to an attacker. Witness I heard Ntakirutimana tell Tutsis at the Complex, "you are all condemned to die."

1998 WL 655708, at *33-37.

In response to the Magistrate Judge's concerns, the Government added a supplemental declaration of Mostert with its second request for surrender.[15] The second request also included the declaration of Pierre-Richard Prosper, the assistant prosecutor for the ICTR. Prosper further clarified the information in Mostert's initial declaration.[16] The district court

---

[15] Mostert's supplemental declaration explained that he used different interpreters for many of the interviews, and that he used the interpreters for a large number of other interviews. He stated that the interpreters appeared to interpret correctly based on several criteria. He also explained that the photograph identification was confirmatory in nature. Mostert showed the photograph of Ntakirutimana to many of the witnesses after they stated that they knew him and had provided a physical description that Mostert believed to be correct.

[16] Prosper provided the following clarifying information. First, many of the witnesses were interviewed several times, and the interviews initially were general and later became more focused. Second, the Office of the Prosecutor for the ICTR has a policy to read back the statement to the witness for accuracy, and all of the witnesses upon whom Mostert relied were subjected to this process. The witnesses all signed their statement and a Witness Acknowledgment Form affirming that the statement is true to the best of their recollection. Third, all witnesses spoke Kinyarwanda, except for Witness B who was interviewed in French by a French-speaking investigator. Prosper stated that the texts of the written statements were proficiently written, and that he personally knew all of the interpreters who performed the final interviews. For each interview, the interpreter signed a certification that he had translated the interview. Fourth, Prosper attested that, based on the information before him, he believed the witnesses to

stated that the supplemental declarations satisfactorily responded to the Magistrate Judge's earlier objections. The district court concluded that probable cause existed to sustain the charges against Ntakirutimana.

Ntakirutimana argues that the district court erred. He contends that the Tribunal has not presented evidence sufficient to show probable cause, because the allegations in Mostert's declarations "lack probative force and are unreliable."[17] Ntakirutimana primarily raises credibility challenges to the evidence against him.[18] Yet, the issue of

---

be reliable. He stated that the witnesses are ordinary citizen-victim-eyewitnesses who were speaking of their own personal experiences. They were not informants, their statements corroborated one another, and he had discovered no evidence that a witness had a reason to lie. Fifth, all the witnesses knew or were familiar with Ntakirutimana, who was a chief pastor in the Complex. Ten of the witnesses claimed Seventh Day Adventist as their religion. All of the witnesses but one were Tutsi.

[17] Ntakirutimana argues initially that "it is rare for substantive criminal allegations in support of an extradition request to be presented solely in an investigator's affidavit." We deem this objection waived, because Ntakirutimana did not raise the objection at his extradition hearing. See *Lo Duca v. United States, 93 F.3d 1100, 1111 (2d Cir. 1996)* (finding that extraditee waived non-jurisdictional objection by failing to raise the objection at the extradition hearing).

[18] Apart from his credibility challenges, Ntakirutimana briefly attempts to explain his actions. He asserts that, because churches were customary places of sanctuary, there would be nothing sinister for anyone to encourage Tutsis to congregate in the Complex. Yet, this explanation fails to explain most of the allegations against

credibility "is a matter committed to the magistrate and is not reviewable on habeas corpus." *Escobedo, 623 F.2d at 1102 n.10* (citations omitted); see also *Quinn, 783 F.2d at 815* ("The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate." (citation omitted)); cf. *Collins, 259 U.S. at 316, 42 S. Ct. at 472* (explaining that a petitioner can introduce evidence on probable cause, but cannot introduce evidence in defense, because otherwise the extradition proceeding will become a full hearing and trial of the case); *Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981)* ("An accused in an extradition hearing has no right . . . to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof" (citation omitted)); *Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973)* (stating that credibility conflict should await trial).

Ntakirutimana asserts that the credibility of the witnesses was not known to the investigators or established by the Tribunal. According to Ntakirutimana, if the witnesses had ties to the Rwandan government, then the witnesses would have been under pressure to incriminate persons about whom they were questioned. The district court noted, however, that Ntakirutimana provided no specific reason to doubt the credibility of the witnesses. The court stated that the witnesses' statements "enjoy several indicia of reliability," such as the similarity of the witnesses' statements. The court resolved the credibility challenge in the Government's favor. We defer to

---

him. Further, Ntakirutimana conceded at the extradition hearing that, without respect to the reliability of the evidence (which has been resolved adversely to Ntakirutimana), the substance of what is reported in the affidavits constitutes probable cause.

this conclusion regarding the credibility of the witnesses.[19] See *Escobedo, 623 F.2d at 1102 n.10.*

Ntakirutimana raises the issue of Mostert's credibility, because the signature page of Mostert's first declaration was typed with a different computer than the first twenty-four pages. Ntakirutimana asserts that Mostert could have signed the signature page, and that, after Mostert's employment ended, the page could have been attached to any text. Thus, Ntakirutimana argues, all of Mostert's declarations cannot be taken at face value. The district court rejected this credibility challenge, finding that Mostert's supplemental declaration, in which he avowed that the first declaration was accurate and complete, answered this allegation. As explained previously, we will not revisit this credibility finding. See *Escobedo, 623 F.2d at 1102 n.10.*

Ntakirutimana also challenges the probable cause determination on the ground that the translators were unreliable. The investigators conducted most of their interviews through translators of English and French, the languages of the Tribunal. With the exception of one French-speaking witness, the witnesses spoke Kinyarwanda, Rwanda's native language. Ntakirutimana argues that the translators were not certified or screened for competence or bias, that there was an enormous potential for distortion by the unscreened interpreters, and that there was no way to gauge the accuracy of the translations. The district court declined to

---

[19] Ntakirutimana contends that eyewitness accounts of traumatic events are inherently unreliable, and that the witnesses' statements are undermined by "Rwanda's oral tradition in which Rwandans adopt and confuse what they have seen with what they have been told by others and consider it their personal experience." Ntakirutimana waived this argument by failing to raise it below. See *Lo Duca, 93 F.3d at 1111.*

address Ntakirutimana's challenge to the reliability of the translations. The court stated that, as long as the evidence is authenticated in accordance with § 3190,[20] n20 then it would not consider challenges to the reliability of the translation. We agree with the district court that we can presume that the translations are correct. See *In re Extradition of David, 395 F. Supp. 803, 806 (E.D. Ill. 1975)* ("The Court feels that the translations must be presumed to be correct unless David presents some convincing evidence otherwise."). The extradition court need not independently inquire into the accuracy of the translations submitted with a formal extradition request, because "such a requirement would place an unbearable burden upon extradition courts and seriously impair the extradition process." *Tang Yee-Chun v. Immundi, 686 F. Supp. 1004, 1009 (S.D.N.Y 1987).* Hence, we decline to address Ntakirutimana's speculations regarding the reliability of the translations.

In short, the district court resolved the credibility challenges adversely to Ntakirutimana, and we will not review those issues. We hold that, based on Mostert's and Prosper's declarations, there is competent evidence in the record to support the district court's finding that the evidence established probable cause to believe that Ntakirutimana committed the crimes charged.

V

Finally, we turn to Ntakirutimana's remaining arguments. Ntakirutimana argues that the U.N. Charter does not authorize the Security Council to establish the ICTR, and that the only method for the U.N. to create an international criminal tribunal is by a multinational treaty. This issue is beyond the scope of habeas review. See *Garcia-Guillern, 450 F.2d at 1191* (outlining three issues for habeas review); cf. *Terlinden, 184 U.S. at 289, 22 S. Ct. at 491-92* (stating that it would be

---

[20] See supra note 13.

impossible for the Executive Department to conduct foreign relations if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered). Ntakirutimana contends additionally that the ICTR is incapable of protecting his rights under the United States Constitution and international law. He contends, for example, that the ICTR is incapable of protecting his due process rights and that the ICTR denies the right to be represented by the counsel of one's choice. Due to the limited scope of habeas review, we will not inquire into the procedures that await Ntakirutimana. See *Garcia-Guillern, 450 F.2d at 1192; Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960)* (regarding as significant that the procedures that will occur in the demanding country are not listed within the scope of habeas review); see also *In re Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989)* (explaining the rule of "non-inquiry"). "Such matters, so far as they may be pertinent, are left to the State Department, which ultimately will determine whether the appellant will be surrendered to the [ICTR]." *Garcia-Guillern, 450 F.2d at 1192.*

VI

For the foregoing reasons, we AFFIRM the order of the district court denying Ntakirutimana's petition for a writ of habeas corpus, and LIFT the stay of extradition.

CONCUR BY: ROBERT M. PARKER

CONCUR:
ROBERT M. PARKER, Circuit Judge, writing separately, special concurrence.

Judge Garza has crafted for the panel a well-written opinion that faithfully adheres to controlling jurisprudence, and thereby has earned my concurrence. I write separately and briefly to invite the Secretary to closely scrutinize the underlying

evidence as she makes her decision regarding whether Ntakirutimana should be surrendered to the International Criminal Tribunal for Rwanda. The evidence supporting the request is highly suspect. Affidavits of unnamed Tutsi witnesses acquired during interviews utilizing questionable interpreters in a political environment that has all the earmarks of a campaign of tribal retribution raises serious questions regarding the truth of their content.

It defies logic, and thereby places in question the credibility of the underlying evidence, that a man who has served his church faithfully for many years, who has never been accused of any law infraction, who has for his long life been a man of peace, and who is married to a Tutsi would somehow suddenly become a man of violence and commit the atrocities for which he stands accused. I fully understand that the ultimate decision in this case may well be a political one that is driven by important considerations of State that transcend the question of guilt or innocence of any single individual. I respect the political process that necessarily is implicated in this case, just as I respect the fact that adherence to precedent compels my concurrence.

To the extent that it may be relevant to the Secretary's decision, I merely add, based on all the information in this record, viewed from the perspective of a judge who has served fifteen years on the trial bench and five years on the court of appeals, that I am persuaded that it is more likely than not that Ntakirutimana is actually innocent.

DISSENT BY: HAROLD R. DeMOSS

DISSENT:
HAROLD R. DeMOSS, Circuit Judge, dissenting:

Our Constitution is the result of a deliberate plan for the separation of powers, designed to prevent both the arrogation of authority and the potential for tyranny. Notwithstanding our nation's moral duty to assist the cause of international justice,

our nation's actions taken in that regard must comport with the Constitution's procedures and with respect for its allocation of powers. That is why we claim to be a nation ruled by law rather than men.

The Attorney General's litigation position in this case has apparently been chosen for the purpose of validating a constitutional shortcut which would bypass the Treaty Clause. She stakes her case on the validity and enforceability of a warrant issued by the United Nations International Criminal Tribunal for Rwanda, which is a nonsovereign entity created by the United Nations Security Council, purporting to "DIRECT" the officials of our sovereign nation to surrender the accused. In defense of this, the Attorney General relies exclusively on what my colleagues have termed a "Congressional-Executive Agreement" -- the coincidence of an "executive agreement" with the Tribunal, entered on behalf of the United States by an ambassador appointed by the President in the course of his duties to conduct foreign affairs, and a purported enabling act passed by simple majorities of both houses of Congress and signed into law by the President.

A structural reading of the Constitution compels the conclusion that most international agreements must be ratified according to the Treaty Clause of Article II. The history of national and international practice indicate that extradition agreements fall into this category. Our Founding Fathers intended that the President have authority to negotiate such agreements, but also that they be ratified pursuant to a special process intended to set a higher standard of legislative agreement than that required for ordinary legislation. The Constitution thus provides a plain procedure for entering into a treaty, which requires the assent of the President and two-thirds of the Senate. That procedure was not followed with respect to the executive agreement to extradite fugitives to the International Criminal Tribunal for Rwanda, and the procedure is not satisfied by the combination of an executive agreement and ordinary legislation. For this reason, I respectfully dissent from the majority's conclusion that the Constitution permits

the extradition of Elizaphan Ntakirutimana based upon a foreign warrant invoking an executive agreement and its implementing statute.

I.

The Attorney General seeks to surrender Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda based on three legal authorities. The first of these authorities is an executive agreement, the "Agreement on Surrender of Persons" between the United States and the Tribunal (hereinafter, Surrender Agreement).[21] The Surrender Agreement was signed on behalf of the United States by the American ambassador to The Netherlands, and it purports to satisfy "the obligation of the United States, pursuant to the Statute of the Tribunal adopted by United Nations Security Council Resolution 955 . . . to surrender accused or convicted persons to the Tribunal." *Surrender Agreement, 1996 WL 165484,* at *1. United Nations Security Council Resolution 955 requires that "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal" and "all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued

---

[21] See Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory Of Neighbouring States, Jan. 24, 1995, U.S.-ICTR, available in *1996 WL 165484.*

by a Trial Chamber under Article 28 of the Statute."[22] Accordingly, the Surrender Agreement provides that:

> The United States agrees to surrender to the Tribunal, pursuant to the provisions of this Agreement and the Statute, persons, including United States citizens, found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal as defined in the Statute.

Surrender Agreement, art. I, § 1, *1996 WL 165484*, at *1.

The second authority is an act of Congress, the National Defense Authorization Act for Fiscal Year 1996 (the Act), Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486. Section 1342 provides, in pertinent part:

> The provisions of chapter 209 of title 18, United States Code [*18 U.S.C. § 3181* et seq.], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to . . . (B) the International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

Pub. L. No. 104-106, § 1342(a), 110 Stat. 186, 486 (1996), reprinted in *28 U.S.C.A. § 3181* note at 214 (West Supp. 1999).

Section 1342(a) has a curious history. First, the provision

---

[22] Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/RES/955 (1994), available in ICTR - Resolutions of the Security Council (visited July 26, 1999) <http://www.un.org/ ictr/english/Resolutions/955e.htm>.

obviously bears no relation by subject matter to the general theme of the Act in which it was enacted, which was matters pertaining to the national defense. Predictably, then, no language bearing any relation to this provision can be found in the original bills proposed in the House of Representatives and Senate for the 104th Congress.[23] The first suggestion about a provision permitting extradition to the International Criminal Tribunals came in the form of a floor amendment offered by Senator Arlen Specter of Pennsylvania. The Specter Amendment, No. 2081, supplied the language which was ultimately enacted as § 1342 of the Act.[24] Senator Specter indicated that this amendment contained legislation which was being sought by the President,[25] and with this assurance (and

---

[23]n23 See S. 1026, 104th Cong. (1995); available in U.S. Gov't Printing Office, GPO Access (hereinafter, GPO Access) (visited July 27, 1999) <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:s1124pcs.txt.pdf>; H.R. 1520, 104th Cong. (1995), available in GPO Access (visited July 27, 1999) <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:h1530ih.txt.pdf>.

[24] See 142 Cong. Rec. S11218 (daily ed. Aug. 2, 1995), available in GPO Access (visited July 27, 1999) <http://frwebgate. access.gpo.gov/cgi-bin/getpage.cgi?dbname=1995_record&page=S11218&position=all>.

[25] See 141 Cong. Rec. S10316 (daily ed., July 19, 1995), available in GPO Access (visited July 27, 1999) <http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10316&dbname=1995_record> (noting referral to the Committee on the Judiciary of a "communication from the Assistant Attorney General, Office of Legislative Affairs, transmitting, a draft of proposed legislation to enable the United States to meet its obligations to surrender offenders and provide

without further discussion), the leadership of the Senate accepted the amendment.[26] n26 In conference, the House receded to the Specter Amendment "with a technical amendment." H.R. Conf. Rep. No. 104-450 (1996), reprinted in 1996 U.S.C.C.A.N. 238, 391. Subsection (a)(1) of the Specter Amendment (ultimately Pub. L. 104-106, § 1342(a)(1), the provision at issue in this appeal) was not altered. The conference report was accepted by the Senate on a 56-34 vote and by the House of Representatives on a 287-129 vote. Public Law 104-106 was subsequently signed by President Clinton, and the Specter Amendment thereby got slipped into law through the back door, without any public discussion or debate about its substantive merits.

Although it relates to foreign relations and performs a function historically performed by treaties, the Specter Amendment (§ 1342) did not originate in the Senate Foreign

---

evidence to . . . the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighboring States"); 141 Cong. Rec. H7010 (daily ed., July 13, 1995), available in GPO Access (visited July 27, 1999) <http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H7009&dbname=1995_record> (same).

[26] See 141 Cong. Rec. S11422 (Aug. 4, 1995), available in GPO Access (visited July 27, 1999) <http://frwebgate.access.gpo. gov/cgi-bin/getpage.cgi?position=all&page=S11422&dbname=1995_ record>.

Relations Committee,[27] and no hearings or deliberations of any sort were ever held by that committee on the subject of extradition to the international criminal tribunals established by the United Nations Security Council. Likewise, although § 1342 relates to extradition procedures in United States courts, it was never considered by the Senate Judiciary Committee.[28] Most curiously, the provision does not purport to be an amendment to the existing statutes on extradition and it was not codified. It appears in the United States Code Annotated only as a "statutory note" -- a literal afterthought. If the ratification of an extradition agreement is a legislative function which our Founding Fathers intended to be performed under the Treaty Clause, the history of the passage of § 1342 stands in stark contrast to that heightened legislative standard. It was a parasite on the defense spending authorization bill, the ultimate passage of which never could have been questioned. Like one of our B-2 stealth bombers, it slipped through the radar net of the legislative process without the public awareness, debate, and consideration normally given to legislation of this importance.

The third authority invoked by the Attorney General is a

---

[27] The jurisdiction of the Foreign Relations Committee includes, among other things, "relations of the United States with foreign nations generally" and "treaties and executive agreements." Sen. Foreign Relations Committee Rule 1(a), available in GPO Access (visited July 27, 1999) <http://www.access.gpo.gov/ congress/senate/srules11.txt>.

[28] The jurisdiction of the Judiciary Committee includes, among other things, "federal courts and judges" and "judicial proceedings, civil and criminal, generally." U.S. Senate Judiciary Comm., Jurisdiction (visited July 27, 1998) <http://www.senate. gov/ similar judiciary/jurisdic.htm>.

warrant issued by the United Nations International Criminal Tribunal for Rwanda, located in Arusha, Tanzania. The warrant reads, in pertinent part: "I, Judge William H. Sekule, Judge of the International Criminal Tribunal for Rwanda . . . HEREBY DIRECT the Authorities of the United States of America to search for, arrest and surrender to the International Criminal Tribunal for Rwanda: Elizaphan Ntakirutimana . . . [who is] currently believed to be in the United States of America." Prosecutor v. Ntakirutimana, No. ICTR-96-17-1 (U.N.I.C.T.R. Sept. 7, 1996) (warrant of arrest and order for surrender). The Tribunal is not a sovereign nation.

II.

The "Congressional-Executive Agreement" method of ratifying the Surrender Agreement with the Tribunal runs afoul of the Constitution's Treaty Clause, and § 1342 alone is constitutionally insufficient to ratify the Surrender Agreement which has been invoked to support the extradition.

A.

Article II, § 2 of the Constitution provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of

the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const. art. II, § 2. The Congressional-Executive Agreement did not conform to this procedure. Not only was ordinary legislation passed in lieu of the Senate's advice and consent, but also the required threshold for passage in the Senate of approval by two-thirds was not achieved.

The Constitution's treaty procedure must be followed in order to ratify an extradition agreement which contractually binds our nation to respect obligations to another nation. The intent of the framers could not be clearer on this point. Our Founding Fathers were very concerned about the new nation becoming entangled in foreign alliances. The possibility of giving the President full authority for foreign affairs was considered and rejected. In The Federalist No. 75, Alexander Hamilton argued that it would be "utterly unsafe and improper" to completely entrust foreign affairs to a President, who is elected for only four years at a time. The Founders were especially concerned with the possibility that, in the conduct of foreign policy, American officials might become seduced by their foreign counterparts or a President might actually betray the country. Thus, while primary responsibility for foreign affairs was given to the President, a significant restraint and "check" on the use of the treaty power was created by requiring for treaties the advice and consent of two-thirds of the Senate. See The Federalist No. 69 (Alexander Hamilton) (noting that this "check" is a major distinction between the presidency and England's monarchy, in which the

king was "the sole and absolute representative of the nation in all foreign transactions"). The decision to require approval of two-thirds of Senators was controversial and hotly debated, but it was ultimately decided that sheer importance of the treaty power merited such a treatment. Treaties cannot be accomplished by any means other than the Article II treaty ratification procedure.

Of course, not all agreements with foreign countries require the full Article II "treaty" treatment in order to be effective. The Constitution implicitly recognizes a hierarchy of arrangements with foreign countries, of which treaties are the most sacrosanct. Compare U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."), with U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."). The Attorney General's primary argument in defense of the enforceability of the extradition agreement with the Tribunal follows this line of thought. She has argued, and the majority echoes (see Majority Op. at 7), that the Constitution contains no explicit reference to extradition.

But the fact of the matter is that while the Constitution has no provisions explicitly relating to extradition, it likewise has no provisions explicitly relating to executive agreements. It only mentions treaties. Our national government is one of limited, enumerated powers. See, e.g., *United States v. Lopez, 514 U.S. 549, 551, 115 S. Ct. 1624, 1626, 131 L. Ed. 2d 626 (1995)* (quoting The Federalist No. 45 (James Madison)); *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77, 2 L. Ed. 60 (1803)*. All agree that the Surrender Agreement is not a treaty. We are therefore left to read between the lines to ascertain whether the President and Congress have wrongfully attempted by ordinary legislative procedures, to exercise a power governed by the Treaty Clause or whether some source of power other than the Treaty Clause enables the President and Congress to bind the country to the Surrender Agreement.

Our inquiry is significantly informed by a demonstration of what specific powers are encompassed by the Treaty Clause. "A treaty is in its nature a contract between two nations, not a legislative act." *Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415 (1829);* see also *Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99, 5 S. Ct. 247, 254, 28 L. Ed. 798 (1884).* Alexander Hamilton explained:

> The power of making treaties . . . relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

The Federalist No. 75. It is precisely the position of the Attorney General that the Surrender Agreement is a valid contract with a foreign authority and that it has the force of law. In Alexander's day, an agreement with those characteristics was called a treaty.

If the Treaty Clause is to have any meaning there is some variety of agreements which must be accomplished through the formal Article II process. Otherwise, the heightened consideration dictated by Article II could be avoided by the President and a majority of Congress simply by substituting the label of "executive agreement" for that of "treaty." The Supreme Court has recognized this principle:

> Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, and inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of

our government and the relation between the States and the United States.

Holden v. Joy, 84 U.S. (17 Wall.) 211, 242-43, 21 L. Ed. 523 (1872) (emphasis supplied).

Plainly, an extradition agreement is a type of agreement historically found in a treaty and therefore governed by the Treaty Clause. Extradition, which is defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender," *Terlinden v. Ames, 184 U.S. 270, 289, 22 S. Ct. 484, 492, 46 L. Ed. 534 (1902)*, has usually been regarded as the proper subject of negotiation and treaty. Historically, the United States has not surrendered a person to a foreign authority (excluding countries or territories controlled by the United States) in the absence of a valid extradition treaty.[29] Every extradition agreement ever entered into by the United States (before the advent of the new Tribunals) has been accomplished by treaty, including the Jay Treaty (1795) and the Webster Ashburton Treaty (1842). The original extradition statutes, enacted in 1848, required the existence of an extradition treaty, and there was no exception until § 1342 was passed to accommodate the Tribunals for Rwanda and the former Yugoslavia. Furthermore, "the principles of international law recognize no right to extradition apart from treaty." *Factor v. Laubenheimer, 290 U.S. 276, 287, 54 S. Ct. 191, 193, 78 L. Ed. 315 (1933).*

---

[29] The Attorney General cites only one historical example of such an extradition, but explicitly refrains from opining as to whether that extradition was validly accomplished.

The insistence on the use of the treaty power for certain types of international agreements comports with the Founding Fathers' intention that the President not have unfettered discretion to enter agreements with foreign nations. See The Federalist No. 75 (Alexander Hamilton). Unless the Article II procedure is insisted upon, the President can exercise such plenary power simply by denominating his agreements as something other than "treaties." See Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation, *108 Harv. L. Rev. 1221, 1273 & n.179 (1995);* cf. *Freytag v. Commissioner, 501 U.S. 868, 880, 111 S. Ct. 2631, 2639, 115 L. Ed. 2d 764 (1991)* ("Neither Congress nor the Executive can agree to waive this structural protection [of the Appointments Clause] . . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic."); *Weiss v. United States, 510 U.S. 163, 189, 114 S. Ct. 752, 766, 127 L. Ed. 2d 1 (1994)* (Souter, J., concurring) (same).

Notably, the United States has publicly declared to the entire world that it can only enter into an extradition agreement through a treaty. In its fifth reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, the United States proclaimed to the international diplomatic community that it "reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate."[30] There is no treaty which has been entered into "with the advice and consent of the Senate"

---

[30] United States Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Nov. 25, 1988), available in United Nations, United Nations Treaty Collection Web Site (visited July 27, 1999) <www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_1.html>.

which authorizes the participation in the Tribunal by the United States. This reservation clearly evidences the intent and expectation of the United States that the only way its participation in the Tribunal could take place was by a duly negotiated and ratified treaty on that subject. A reading of the Treaty Clause of the Constitution which permits the semantic shenanigans suggested by the Attorney General is an insult to the intricate structure of the Constitution, which seeks to avoid tyranny and ensure democracy through a deliberate separation of power and a delicate system of checks and balances. See, e.g., *Gregory v. Ashcroft, 501 U.S. 452, 458, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991);* The Federalist No. 28 (Alexander Hamilton); The Federalist No. 51 (James Madison). In contrast, § 1342(a) came into being without hearings by any committee of the Congress, without a committee report from any committee of Congress, and without any debate on the floor of the Senate or the House of Representatives as to the substance of its provision. I therefore am compelled to conclude that Ntakirutimana may not be constitutionally surrendered because of the failure of the executive and legislative branches to comply with Article II.[31]

B.

The Attorney General and my colleagues in the majority place great reliance on *Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936),* in which the Court stated: "It cannot be doubted that the power

---

[31] See *Then v. Melendez, 92 F.3d 851, 853 (9th Cir. 1996)* ("The advice and consent of the Senate is a constitutional prerequisite to a valid treaty, and the executive branch does not have the power to extradite alleged criminals absent a valid extradition treaty.") (dicta); *Gouveia v. Vokes, 800 F. Supp. 241 (E.D. Pa. 1992)* (extradition must be authorized by a treaty).

to provide for extradition is a national power; it pertains to the national government and not to the states. But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision." *299 U.S. at 8, 57 S. Ct. at 102* (internal citation omitted). Valentine was a case that did involve a treaty -- its stray reference to "legislative provision" is pure dicta, and certainly not a plain holding that extradition may be accomplished by the President simply on the basis of congressional approval. Likewise, in *Terlinden v. Ames, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902)*, in which the Court noted that "in the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision," *184 U.S. at 289, 22 S. Ct. at 492*, there was also a valid extradition treaty, and the reference to a "legislative provision" is again dicta.

The Attorney General insists that the President has the power to unilaterally enter an extradition agreement with foreign nations, the only distinction between that variety of agreement and an Article II treaty being that only a treaty will impose upon the President a duty to extradite. In defense of this principle, the Attorney General points to *Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933)*, which states:

While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled, and it has been said that it is under a moral duty to do so, the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.

290 U.S. at 286, 54 S. Ct. at 192 (internal citation omitted); see also *United States v. Rauscher, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886).*

But these cases do not support the Attorney General's

position. The quoted passage stands for the unremarkable propositions that a sovereign nation can (and perhaps should), if consistent with its own laws, surrender to another sovereign nation one of the surrendering nation's own citizens who is accused of crimes by that other sovereign nation, but that no such duty or legal obligation arises absent a treaty. Those propositions do not mean that the President, acting unilaterally, can enter non-binding executive agreements to extradite,[32] or that Congress may ratify such an agreement. The Attorney General does not purport to act pursuant to some sort of sovereign power to surrender Ntakirutimana; she has consciously premised her argument on the validity and enforceability of the Surrender Agreement. This is plain from the briefs filed in this Court.[33] Given that the Surrender Agreement is the authority invoked by the Attorney General, it is the authority which we must consider.

III.

The executive and legislative branches of government erroneously disregarded their obligation to respect the structure provided by the Constitution when they purported to enter this extradition agreement.[34] We should issue a writ of

---

[32] See *Valentine, 299 U.S. at 17, 57 S. Ct. at 106*; M. Cherif Bassiouni, International Extradition: United States Law and Practice 67 (3d ed. 1996).

[33] A recent news story made this point clear, reporting: "Federal prosecutors handling the [Ntakirutimana] case say the United States has a valid contract with the United Nations to enforce resolutions of the U.N. Security Council." U.S. Appeals Court to Hear Extradition Case of Rwandan Pastor, AP, Mar. 11, 1999, available in LEXIS, News Library, Wires File.

[34] It is not true, as has been suggested in the media, that "if Mr. Ntakirutimana's constitutional argument

habeas corpus, and Ntakirutimana should not be surrendered. The extradition agreement in place between the United States and the Tribunal is unenforceable, as it has not been properly ratified. The agreement's implementing legislation is unconstitutional insofar as it purports to ratify the Surrender Agreement by a means other than that prescribed by the Treaty Clause. The two acts seek impermissibly to evade the mandatory constitutional route for implementing such an agreement.[35] I therefore respectfully dissent.[36]

---

prevails, it will diminish the ability of the United States to cooperate in international war crimes prosecutions." War Crimes and Extradition, Wash. Post, Apr. 10, 1999, at A20, available in *1999 WL 2210242.* All that is required for participation is conformance with the Constitution. If the President wishes to bind the United States to an agreement such as the Surrender Agreement, he must obtain the advice and consent of two-thirds of the Senate as provided in Article II.

[35] Whether executive and legislative actions such as those giving rise to this case reflect, as political commentator George Will has suggested, a disturbing trend of "dilution of American democracy," I leave for others to judge. George Will, See You in Congress . . ., Wash. Post, May 20, 1999, at A29, available in *1999 WL 17003981* and Sacramento Post, Sacbee Voices - George Will (visited July 27, 1999) <http://www.sacbee.com/voices/national/will/will_19990520.html>.

[36] Ntakirutimana challenges the Tribunal itself as an ultra vires creation of the United Nations Security Council. His is not a novel argument -- the authority of the ad hoc Tribunals for Rwanda and the former Yugoslavia has been hotly debated in academia, see, e.g., Tara Sapru, Comment, Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into the Rwandan Crisis, 32

Tex. Int'l L.J. 329, 339 (1997), rejected by Rwanda's neighbors who refuse to accept the ICTR's process, and fully litigated in the Tribunal for the former Yugoslavia. To the extent that the viability of the Tribunal is a legitimate subject of foreign policy within the realm of the Executive, separation-of-powers concerns justify our Court in abstaining from the political question of the Tribunal's authority. See *Baker v. Carr, 369 U.S. 186, 210-11, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663 (1962);* see generally 13 Charles Alan Wright et al., Federal Practice and Procedure § 3529 (2d ed. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Stamp
ENTERED
NOV 30 1998

ELIZAPHAN NTAKIRUTIMANA,

Petitioner,

v. CIVIL ACTION NO. L-98-76

JANET RENO, et al.,

Respondents.

ORDER

Pending before the Court is Ntakirutimana's Petition for writ of habeas corpus. Having considered Ntakirutimana's petition and supplemental briefing, the Government's opposition thereto, the entire record of the extradition proceeding, and the applicable legal authorities, the Court will DENY the petition.

In his petition, as clarified by his reply,[1] Ntakirutimana

---

[1] In his petition, Ntakirutimana baldly asserts two grounds for relief (namely, that Ntakirutimana's surrender would violate prohibitions against ex post facto laws and bills of attainder) that Ntakirutimana neither explains in his petition nor raises at all in his more extensive supplemental

raises five grounds for habeas corpus relief. First he argues that the Order certifying that Ntakirutimana may properly be surrendered to the International Criminal Tribunal for Rwanda is void because (1) the second request on which the Order was based was barred by *res judicata* and (2) this Court "is barred from acting on this petition because the assignment to it creates the appearance of unfairness." Moreover, he argues that the Order certifying Ntakirutimana's surrender is unconstitutional because (1) a surrender pursuant to an executive agreement and implementing legislation is unconstitutional because the agreement is not an Article II treaty, (2) the Tribunal's second request for for Ntakirutimana's surrender failed to establish probable cause, and (3) Ntakirutimana is being surrendered to an "unlawful international power [that is] incapable of protecting fundamental human rights."

The Court has addressed each of these arguments in its Order certifying Ntakirutimana's surrender. See Order of August 5, 1998. Civil Action Number L-98-43 (Dkt. #37) at 6-7 (noting the propriety of a re-filed request and the inapplicability of *res judicata* principles in extradition proceedings); *id.* at 15 (listing cases which hold that a judge who presides over an extradition hearing need not recuse in the subsequent habeas corpus action); id. at 18-31 (finding that the Surrender Agreement and §1342 of Public Law No. 104-106 are, together, a constitutional basis for Ntakirutimana's surrender); *id.* at 32-59 (finding that there is

---

briefing. As Ntakirutimana appears to have dropped these arguments from his petition and as his petition failed to articulate any basis for these arguments in the first place, the Court believes that these arguments cannot serve as a basis for habeas relief. Therefore, the Court will not address these arguments in detail. To the extent that Ntakirutimana's bare petition sufficiently raised these as grounds for habeas relief, the writ is DENIED on these grounds.

probable cause to sustain both indictments and to warrant surrender); *id.* at 59-60 (declining to entertain Ntakirutimana's challenges to (1) the Tribunal's constitutional authority under the United Nations charter and (2) the fairness of the Tribunal's procedures because such inquiries are inapropriate for this Court). For all of the reasons articulated in its Order certifying Ntakirutimana's surrender, the Court must DENY Ntakirutimana's habeas petition.

With respect to Ntakirutimana's request that his surrender be stayed pending his appeal of the Court's denial of his habeas petition, the Court finds that a temporary stay is warranted. Accordingly, any surrender of Ntakirutimana shall be TEMPORARILY STAYED for 30 days in order for Ntakirutimana to make a prompt application to the Court of Appeals for the Fifth Circuit for a stay pending the determination of Ntakirutimana's appeal. Should he file such an application, the stay will remain in effect until the Fifth Circuit rules on his application.

So ORDERED.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 30th day of November 1998.

/s/
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION

IN THE MATTER OF THE SURRENDER OF ELIZAPHAN NTAKIRUTIMANA

CIVIL ACTION NO. L-98-43

August 6, 1998, Entered

COUNSEL: For ELIZAPHAN NTAKIRUTIMANA, defendant: Ramsey Clark, Attorney at Law, New York, NY.

For UNITED STATES OF AMERICA, movant: Donald DeGabrielle, US Attorneys Office, Houston, TX.

For THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, movant: Michael Posner, Lawyers Committee for Human Rights, New York, NY.

For THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, movant: Donald Francis Donovan, Debevoise & Plimpton, New York, NY.

For THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, movant: Loren Kieve, Debevoise & Plimpton, Washington, DC.

JUDGES: JOHN D. RAINEY, UNITED STATES DISTRICT JUDGE.

OPINION BY: JOHN D. RAINEY

OPINION: ORDER

On June 17, 1998, the Court held a hearing on the Government's request for Ntakirutimana's surrender to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States ("the Tribunal"). Having considered the arguments of counsel, the extensive briefing by counsel for Ntakirutimana, the United States Attorney, and the Lawyers Committee for Human Rights, the Court has concluded that Ntakirutimana is properly extraditable to the Tribunal for the offenses charged in the indictments.

FACTUAL BACKGROUND

I. The Indictments

On June 20, 1996, Elizaphan Ntakirutimana was indicted by the Tribunal; Tribunal Judge T.H. Khan, of the Tribunal, confirmed the indictment and issued a warrant for Ntakirutimana's arrest on June 21, 1996. The indictment charges that Ntakirutimana committed genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereof.

At the time of the events which form the basis of the charges against him, Ntakirutimana was the President of the Seventh Day Adventist Church in Rwanda and was based in a church complex in Mugonero -- an area within the Kibuye Prefecture of Rwanda. The charges against him stem from the following alleged conduct: Ntakirutimana, a Hutu, together with a number of other individuals, prepared and executed a plan by which large numbers of the local Tutsi population were encouraged to seek refuge in the Mugonero Seventh Day Adventist Church and hospital compound where

Ntakirutimana was a pastor. Ntakirutimana then raised an armed mob of Hutus, led them to the compound and directed the slaughter of the Tutsis who had sought shelter there.

On September 7, 1996, Ntakirutimana was indicted on additional charges. Judge William Sekule of the Tribunal confirmed the second indictment and issued another warrant for the arrest of Ntakirutimana on September 7, 1996. The second indictment also charges that Ntakirutimana committed genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereof. This indictment is based upon events occurring shortly after the Mugonero massacre in the Bisesero region -- an area to which survivors of the Mugonero attack (and other attacks) had fled. These charges against Ntakirutimana stem from the following alleged conduct: Ntakirutimana, together with another of the co-defendants charged in the June 20, 1996 indictment, continued their pattern of genocide in the months following the Mugonero massacre by, in essence, operating in the Bisesero area of Rwanda with armed groups to seek out and execute members of the Tutsi population, including survivors of the Mugonero massacre.

II. Proceedings in the United States

Ntakirutimana has been living in Laredo, Texas since he left Rwanda in 1994. In 1996, the Government filed its first request for Ntakirutimana's surrender to the Tribunal. Pursuant to this request, Judge Kazen ordered Ntakirutimana arrested and detained within this judicial district. However, on December 17, 1997, Magistrate Judge Notzon denied the Government's request for surrender and ordered Ntakirutimana's release. Magistrate Notzon essentially found that Ntakirutimana could not be surrendered for two independent reasons: (1) he found that the federal statute authorizing Ntakirutimana's surrender to the Tribunal was an unconstitutional assignment of authority to the extradition

judge since extradition requires an extradition treaty ratified by the President and approved by two-thirds of the Senate, and (2) he held that the Government's request and supporting documentation did not establish probable cause.

Believing that Judge Notzon's decision was not appealable, on January 29, 1998 the Government re-filed its request for surrender seeking review by a different judge in the Laredo division. After Chief Judge Kazen recused, the case was transferred to this Court. On February 26, 1998, the Court granted the Government's request for a provisional arrest and ordered the issuance of a warrant for Ntakirutimana's arrest. Following a hearing and a review of briefing filed by counsel for both sides, the Court granted Ntakirutimana's release on bail pending the determination of the Government's request for surrender; Ntakirutimana has been living in his son's home subject to various restrictions since that time.

III. The Legal Basis for the Government's Request for Ntakirutimana's Surrender

The Government seeks Ntakirutimana's surrender to the Tribunal on the basis of section 1342(a)(1) of Public Law No. 104-106, a statute which (1) implemented the United States' executive agreement with the Tribunal by providing for the surrender of those found in the United States who had been charged with or convicted of violations within the competence of the Tribunal, and (2) made applicable to § 1342 surrender proceedings the procedures set forth in *18 U.S.C. § 3181,* et seq, and case law pertaining to international extradition. Specifically, the history of the legislation is as follows:

On November 8, 1994, the United Nations Security Council adopted Resolution 955, establishing an international tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. U.N.S.C. Res. 955 (Nov. 8, 1994), at 1-3, reprinted in *33 I.L.M. 1598, 1600 (1994).* The statute

governing the Rwanda Tribunal, which is annexed to Resolution 955, requires member states of the United Nations to "comply without undue delay with any request for . . . the surrender or the transfer of the accused to the International Tribunal for Rwanda." Tribunal Statute, art. 28, §§ 1, 2(e), reprinted in *33 I.L.M. 1598, 1612 (1994).*

To carry out its obligations under Resolution 955, on January 24, 1995, the United States entered into an agreement with the Tribunal for Rwanda, called the Agreement on Surrender of Persons Between the Government of the United States and the Tribunal (the "Surrender Agreement"). An "executive agreement," entered into without congressional participation, the Surrender Agreement provided that the United States would "surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal." Surrender Agreement, art. 1.

On February 10, 1996, Congress passed and the President signed into law, legislation to implement the Surrender Agreement. Section 1342(a)(1) of Public Law No. 104-106 provides that, aside from certain limited exceptions concerning admissible evidence and payments of fees and costs, the statutory provisions related to extradition law *(18 U.S.C. §§ 3181* et seq.) "shall apply in the same manner and extent to the surrender of persons, including United States citizens, to . . . the International Tribunal for Rwanda, pursuant to the [surrender] agreement." Pub. L. No. 104-106, § 1342(a)(1), 110 Stat. 486 (1996). Among the statutory provisions made applicable to surrender proceedings brought under § 1342 is *18 U.S.C. § 3184,* which authorizes a judge to hold a hearing to consider the request for surrender, and, if the judge finds that there is sufficient basis for the request, to certify to the Secretary of State that the individual may be surrendered. See *18 U.S.C.A. § 3184* (West Supp. 1998). It is on this basis that the Government seeks the surrender of Ntakirutimana.

ANALYSIS

Ntakirutimana has contested the Government's request for surrender on several grounds. First, he argues that the Government should not be allowed to re-file its request for surrender because such a re-filing violates principles of double jeopardy, collateral estoppel, res judicata or "law of the case" doctrine. He argues that even if a second request were appropriate under ordinary circumstances, because Magistrate Notzon ruled that the statute was unconstitutional and that he did not have jurisdiction, his ruling was a final determination that should have been appealed rather than re-litigated. Second, Ntakirutimana argues that he cannot be surrendered to the Tribunal because Article II of the United States Constitution requires that extradition be done pursuant to a treaty that has been ratified by the Senate and there is no such treaty operating in this case. Third, Ntakirutimana argues that the Government's presentation of evidence fails to establish probable cause as required for a certificate of extraditability. Finally, Ntakirutimana argues that he cannot be surrendered because the criminal Tribunal was not authorized by the United Nations Charter and because he believes that the Tribunal will not and cannot provide him with a fair trial. The Court will address these arguments in turn.

I. THIS SECOND REQUEST FOR SURRENDER IS PROPERLY BEFORE THE COURT

A. The General Propriety of a Re-filed Request

Ntakirutimana first argues that the case is not properly before the Court because it is the Government's second request for surrender. Ntakirutimana believes that the rule that the government can re-file an extradition request that has once been dismissed conflicts with several basic principles of law and justice. Specifically, he argues that multiple proceedings violate the principles underlying double jeopardy, res judicata, collateral estoppel, and "law of the case." However, despite these arguments, the law is clear that when a court denies a

request for surrender, the Government's only remedy is to re-file the request. See *Collins v. Loisel ("Loisel II"), 262 U.S. 426, 429, 67 L. Ed. 1062, 43 S. Ct. 618 (1923); Ahmad v. Wigen, 910 F.2d 1063, 1065 (2d Cir. 1990);* In re *Requested Extradition of Mackin, 668 F.2d 122, 125-130 (2d Cir. 1981); United States v. Doherty, 786 F.2d 491, 501 (2d Cir. 1986)* (concluding (1) that application of res judicata would be inappropriate, (2) that the second request must be considered de novo, and (3) that the determination of the "previous magistrate [should be accorded] only such weight as [a judge] would give to an opinion of a respected judge in an unrelated case"); *Hooker v. Klein, 573 F.2d 1360, 1365-68* (9th Cir.) (explaining that (1) findings of extraditability are not subject to appeal, (2) the doctrine of res judicata is "wholly inappropriate" in the extradition context because an extradition order is not a final judgment, and (3) where the government makes a second extradition request in good faith, there is no constitutional bar to the reinstitution of the extradition proceedings and the only relief from an abuse of multiple attempts to extradite "lies not in judicial limitation, but rather with the fair-mindedness of the government in fulfilling its obligation under treaties of extradition"), cert. denied, *439 U.S. 932, 58 L. Ed. 2d 327, 99 S. Ct. 323 (1978); In re Extradition of Atta, 706 F. Supp. 1032, 1036 (E.D.N.Y. 1989)* (the United States may relitigate issues of law and fact and it is entitled to a de novo hearing).

B. The Propriety of the Extradition Judge's Entering and the Government's Appealing Constitutional and/or Jurisdictional Rulings

Ntakirutimana's more interesting argument is that this rule against the appealability of extradition orders should not apply when the first extradition judge dismisses the request for surrender on a jurisdictional basis. He argues that even if probable cause decisions are not appealable "final orders," a finding that a court lacks jurisdiction is a final order from which parties should be able to appeal. In addressing this matter, the Court has also considered a related issue: the

Government's request that the Court either (1) avoid deciding the constitutional issue raised by Ntakirutimana, (2) reach the constitutional issue presented as a jurisdictional prerequisite and, if the Court finds that it lacks jurisdiction, dismiss on that ground alone, or (3) reach all constitutional and surrender issues, if the Court believes that the statute is constitutional, since Ntakirutimana can seek habeas review of both issues. Thus, the parties' arguments present two related questions: (1) Should the Government have appealed Magistrate Notzon's decision instead of re-filing its request for surrender? and (2) Is it proper for an extradition judge to reach constitutional challenges?

1. Because Magistrate Notzon Found that There was No Probable Cause, Magistrate Notzon's Ruling was Not Appealable Even if Ntakirutimana is Correct that the Magistrate's Jurisdictional Finding Would Otherwise be Appealable.

As an initial matter, the Court must reject Ntakirutimana's argument that Magistrate Notzon's order was appealable simply because it contained a jurisdictional finding. Although Ntakirutimana and the Government appear to agree that a dismissal for lack of jurisdiction in an extradition proceeding might be appealable if the judge dismissed on that ground alone, the Court agrees with the Government that its filing of a second request was the proper course of action in this case for two reasons. First, it is not at all clear that Magistrate Notzon's order would have been appealable, even by mandamus, since there is no precedent for such an appeal.[1]

---

[1] The court in In re Requested Extradition of Mackin responded to a similar argument. In upholding the magistrate judge's jurisdiction to consider whether an offense was extraditable under the treaty, the court rejected the magistrate judge's speculation that an order denying extradition on grounds other than probable cause might be subject to a direct appeal. *In re Requested Extradition of*

Second, the re-filing of the request for surrender was proper since Magistrate Notzon found against the Government on alternative grounds. In other words, since Magistrate Notzon found not only that the statute was unconstitutional but also that there was no probable cause, the order cannot be reviewed since a reversal on constitutional grounds would not affect the judgment.

2. Reaching the Merits of Ntakirutimana's Constitutional Argument Is Appropriate in This Case.

Of course, the difficulty concerning whether a jurisdictional ruling intermingled with a probable cause ruling should be appealable is related to the difficult consideration of whether judges presiding over extradition proceedings should reach jurisdictional/constitutional issues in the first place. In addressing the question of whether courts have jurisdiction to consider challenges to the constitutionality of an extradition during the extradition proceeding itself (as opposed to considering these matters on habeas review), a discussion of

---

Mackin, 668 F.2d 122, 130, n.13 (2d Cir. 1981). The magistrate had "suggested that an order upholding the political offense exception might be appealable whereas orders denying extradition for lack of sufficient probable cause were not, since the latter were akin to a preliminary hearing or a refusal of a grand jury to indict, in both of which circumstances the Government's remedy is to try again. In contrast, a ruling on the political offense exception is more like a judicial one applying law to the facts." Id. The court rejected the argument stating that it found "nothing in the statutory language or the cases to support this distinction" and that in any case, "if the Government were allowed to appeal the Magistrate's adverse finding with respect to the political offense exception, it would be hard to deny Mackin a cross-appeal from her finding of probable cause." Id.

the case law concerning the non-appealability of typical extradition orders is helpful. Although courts that have held that extradition orders are non-appealable invariably make that decision in the exclusive context of probable cause determinations, their rationale for non-appealability is relevant to the question now confronting the Court: whether the Court should entertain Ntakirutimana's constitutional challenges to the statute authorizing surrender to the Tribunal.

Courts have held that extradition decisions are not appealable under *28 U.S.C. § 1291* because " *28 U.S.C. § 1291*, which permits appeals of 'final decisions of the district courts' does not contemplate appeals from decisions of judicial officers sitting in extradition matters." *In re Extradition of Howard, 996 F.2d 1320, 1325 (1st Cir. 1993)* (citing numerous cases). Essentially, the rule of non-appealability of extradition orders is grounded in two unique aspects of extradition law: (1) extradition orders are not final as contemplated by *28 U.S.C. § 1291*, and (2) extradition orders are not "decisions of the district courts" as contemplated by *28 U.S.C. § 1291* since extradition judges do not act in their capacity as Article III judges. With respect to the first rationale, courts have specifically held that extradition orders are not final because the final determination on extradition is made by the executive, not the judicial branch. See *Escobedo v. United States, 623 F.2d 1098, 1105* (5th Cir.) ("The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs."), cert. denied, *449 U.S. 1036, 66 L. Ed. 2d 497, 101 S. Ct. 612 (1980)*. In other words, "a finding of extradition signals the start, rather than the conclusion, of litigation of the fugitive's guilt or innocence. As opposed to a final judgment, it is truly an interlocutory order, more akin to a preliminary hearing on criminal charges. And in that area of the law, it is well settled that a finding of lack of probable cause does not bar the state from rearresting the suspect on the same charges." *Hooker, 573 F.2d at 1367-68* (also finding that an extradition order lacks another requirement of res judicata in that the decision is not "on the merits" since the

merits of the fugitive's guilt or innocence are not explored and participation by the fugitive is limited).

The second rationale for the rule on non-appealability is the fact that in making an extradition decision under *18 U.S.C. § 3184*, an extradition judge is not acting in his or her capacity as an Article III judge and, thus, the decision concerning extradition is not a decision of the "district court." See *In re Extradition of Howard, 996 F.2d at 1325* (allowing a direct appeal only because it was mandated by the treaty but emphasizing that "ordinarily neither party to an extradition proceeding may challenge a decision rendered therein by direct appeal" because the extradition officer is not acting as a judicial officer); *Martin v. Warden, 993 F.2d 824, 827 (11th Cir. 1993)* (because an extradition proceeding is not an ordinary Article III case or controversy and is clearly not a criminal proceeding, "the judiciary [is] serving an independent review function delegated to it by the Executive and defined by statute"); *Austin v. Healey, 5 F.3d 598, 603 (2d Cir. 1993)* ("The function performed by the judicial officer in certifying extraditability has not historically been considered an exercise of the 'judicial power of the United States' at all. . . . The judicial officer conducting an extradition hearing is said to act in a 'non-institutional capacity by virtue of a special authority.' . . . Orders certifying extraditability are non-appealable precisely because they do not emanate from constitutional courts."), cert. denied, *510 U.S. 1165, 127 L. Ed. 2d 542, 114 S. Ct. 1192 (1994)*. Rather, the extradition officer's "only tasks are to determine whether an individual is extraditable and, if so, to certify extraditability to the ultimate decisionmaker (the Secretary of State)." *In re Extradition of Howard, 996 F.2d at 1325;* see also *18 U.S.C. § 3184.*[2]

---

[2] Courts have found this statutory framework constitutional. See *LoDuca v. United States, 93 F.3d 1100* (2d Cir.) (finding that this framework did not violate the separation of powers doctrine since only individual judges, justices and magistrates, not federal courts, were subject to

It is obvious from these holdings that both of the rationales for non-appealability contemplate that it is the probable cause aspect of the extradition order that renders the case non-appealable. In other words, the interlocutory nature of the certification of extraditability does not appear interlocutory and prohibitive of an appeal if the finding is jurisdictional. Likewise, it seems that a jurisdictional decision by a judge must be a decision of a "district court" and not merely of an "extradition judge" since *18 U.S.C. § 3184* does not authorize judges to make decisions other than probable cause determinations.[3] In any event, this discussion shows that

---

the statute and the function performed by an extradition officer is not an exercise of the judicial power of the United States), cert. denied, *117 S. Ct. 508 (1996); Ward v. Rutherford, 287 U.S. App. D.C. 246, 921 F.2d 286 (D.C. Cir. 1990)* (Ruth Bader Ginsburg, J., writing for the court) (finding that the extradition statute does not offend Article III), cert. dismissed, *Ward v. Attridge, 501 U.S. 1225, 115 L. Ed. 2d 1013, 111 S. Ct. 2844 (1991).*

[3] That is not to say that a court's inquiry into matters other than probable cause is improper. Courts, for example, routinely operate as "courts" rather than as extradition judges (even during extradition proceedings) when they decide whether the fugitive should be admitted to bail. See, for example, *In re Requested Extradition of Kirby, 106 F.3d 855, 858-60 & n.4 (9th Cir. 1996)* (bail decisions are appealable under *28 U.S.C. § 1291* because they are "final" orders of "district courts"). Case law is clear that bail determinations are appropriate even though bail for extraditees is not authorized by statute. *Id. at 858.* Interestingly, it is for this reason that bail determinations are appealable. *Id. at 859-60 & n.4* ("We agree that a judge's decision rendered pursuant to section 3184 is not a decision of a district court. However, the grant of bail cannot be considered a decision rendered pursuant to section 3184,

combining adverse jurisdictional rulings with rulings on probable cause creates some unique problems since it is unclear how the Government should proceed. And again, it is for this reason that the Government has requested that the Court either (1) refuse to reach the constitutional issue, (2) limit itself to the constitutional issue if it finds that it lacks jurisdiction, or (3) reach both the constitutional issue and the probable cause issue if it finds that the statute is constitutional since Ntakirutimana can then seek habeas review of both findings.

In considering these requests, the Court agrees that if it finds that it has no jurisdiction it should not proceed to a probable cause determination (although the Court is still not sure that the Government would be able to appeal such an order). With respect to the first and third requests, the Court has decided in favor of request (3) and will consider Ntakirutimana's challenges to the constitutionality of his proposed surrender. The Court has decided upon this course of action for the following reasons:

a. Other Courts have Reached Constitutional Issues During Extradition/Surrender Proceedings.

The Court's decision to consider the constitutional arguments at this stage is bolstered by the fact that other courts have done likewise. The Court acknowledges that two courts have concluded that considering the constitutionality of an extradition statute is beyond the scope of an extradition judge's functions as contemplated by *18 U.S.C. § 1384*. See *In re Extradition of Lahoria, 932 F. Supp. 802, 820 (N.D. Tex. 1996)* (judge concluding, without discussion, that he should not address challenges to the extradition statute in his capacity

---

because section 3184 does not authorize judges to grant bail.").

as contemplated by *18 U.S.C. § 3184); In re Extradition of McMullen, 769 F. Supp. 1278, 1281 (S.D.N.Y. 1991)* (because magistrate judge expressed concerns about her jurisdiction to consider constitutional challenges to extradition and because extraditee concluded that the magistrate judge did not have jurisdiction, the district court entertained the extraditee's habeas petition prior to the extradition hearing because there were "unusual circumstances"), aff'd in part and rev'd in part on other grounds, *989 F.2d 603 (2d Cir. 1992)*, cert. denied, *510 U.S. 913 (1993)*.

However, other courts have readily decided constitutional issues during the extradition proceeding. For example, in Hilario v. United States, in denying the habeas petition, the court noted that the petitioner had presented, and the magistrate had rejected, the same constitutional arguments during the extradition proceeding. *854 F. Supp. 165, 167 (E.D.N.Y. 1994)*. Likewise, the district judge in In re Extradition of Marzook considered and rejected the extraditee's arguments that § 3184 was unconstitutional. *924 F. Supp. 565, 569 (S.D.N.Y. 1996)* (although the extraditee had argued that his constitutional challenge should be addressed by the court's early consideration of a habeas petition (a course of action approved in McMullen), the court (1) found this approach unnecessary, (2) denied the habeas petition, and (3) addressed the constitutional challenge and, thus, his jurisdiction, at the outset of the extradition proceeding). Although the precedent is obviously evenly divided on this issue, the Court is inclined to agree with the Marzook court's approach especially in light of other considerations as discussed below.

b. Extradition Judges Often Determine Whether There is a Treaty in Existence Under Which a Fugitive is Extraditable and this Inquiry is not Substantially Different from a Determination of Whether a Surrender Agreement is Void or Ineffective Because of a Constitutional Deficiency.

The Court also believes that it should consider

Ntakirutimana's constitutional arguments at this stage in the proceedings because such considerations are tantamount to considering whether there is a valid "extradition treaty" under which Ntakirutimana may be surrendered; in other words, a statute's potentially unconstitutional status is simply one of several possible reasons that an "extradition treaty" may be invalid. Along these lines, it is common for extradition judges to satisfy themselves that there is, in fact, a treaty in existence between the United States and the requesting country. See, for example, *Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971)* ("the lower court found that there is a treaty in existence between the United States and the Republic of Peru"), cert. denied, *405 U.S. 989 (1972)*. Additionally, magistrate judges routinely consider whether the offenses charged are properly extraditable. See *In re Extradition of Mackin, 668 F.2d 122, 131-32 (2d Cir. 1981)* (rejecting petitioner's argument that the magistrate had exceeded her jurisdiction by deciding whether the offenses came within the political offense exclusion of the treaty); *Quinn v. Robinson, 783 F.2d 776, 787* (holding that it is proper for a magistrate to consider whether an offense is extraditable under the treaty and refusing to "conclude in the absence of explicit language that Congress intended to restrict the ability of the judiciary to carry out its role in protecting the liberty interests of individuals by requiring us to review extradition orders without considering all aspects of the pertinent question . . . ."), cert. dismissed, *479 U.S. 882 (1986)*. Therefore, there is ample precedent for the notion that § 3184 does not confine extradition judges to mere probable cause determinations; rather, extradition judges may consider the more fundamental and preliminary question of whether there is a proper basis for extradition.

It seems to the Court that determining the constitutionality of a statute authorizing surrender to a foreign entity is similar to determining the validity of a treaty on any ground (constitutional or otherwise) and the validity of an extradition thereunder. Therefore, the Court believes that it is appropriate to consider, at the outset, whether there is a valid treaty in

existence under which Ntakirutimana might be extraditable on a finding of probable cause. The Court believes that this is especially the case where there is no specific binding authority for the unusual proposition that a court cannot consider its own jurisdiction before certifying a fugitive for surrender, but must wait until it, or another court, addresses the matter during habeas review.

c. Refusing to Address the Constitutional Arguments at this Time would be Unreasonably Formalistic.

Finally, the Court believes that a refusal to address the constitutional issues at this time would be unreasonably formalistic. After all, the parties have already provided full briefing of the issue and, since the Court also finds probable cause supporting Ntakirutimana's extraditability, the constitutional issue may very well come before this Court anyway on habeas review. See *28 U.S.C.A. § 2241* (West 1994); see also *Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1408 (9th Cir. 1988)* ("[A] judge who presides over an extradition hearing need not recuse and may hear a habeas corpus action."), cert. denied, *490 U.S. 1106, 104 L. Ed. 2d 1020, 109 S. Ct. 3157 (1989); Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985)* (holding same), cert. denied, *475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986)*, vacated on other grounds, *10 F.3d 338 (6th Cir. 1993); David v. Attorney General, 699 F.2d 411, 416-17* (7th Cir.) (holding same), cert. denied, *464 U.S. 832, 78 L. Ed. 2d 114, 104 S. Ct. 113 (1983)*.

Therefore, for all of the above reasons, the Court believes (1) that the Government's request for Ntakirutimana's surrender is properly before the Court and (2) that the Court may properly consider the constitutional issues raised by Ntakirutimana. Accordingly, the Court will proceed to the merits of Ntakirutimana's argument that the Surrender Agreement and the implementing legislation at Public Law No. 104-106, under which the Government seeks surrender, are unconstitutional as legal bases for Ntakirutimana's surrender

to the Tribunal.

II. THE CONSTITUTION DOES NOT REQUIRE THAT SURRENDER BE MADE PURSUANT TO AN ARTICLE II TREATY

Ntakirutimana argues that his surrender to the Tribunal would be unconstitutional. His argument goes as follows: (1) the power to extradite stems from Article II, Section 2, Clause 2 of the Constitution which gives the President the power to make treaties and to appoint ambassadors with the advice and consent of the Senate; (2) extraditions have historically been made pursuant to a treaty; (3) since the authority to extradite stems from the foreign policy powers of Article II and since, historically, extraditions have, in fact, been made pursuant to Article II treaties, it follows that an extradition is unconstitutional if not made pursuant to a treaty which has been subjected to the ratification procedures of Article II; (4) the Government seeks to surrender Ntakirutimana to the Tribunal pursuant, not to a treaty, but rather to section 1342(a)(1) of Public Law No. 104-106, a statute implementing an executive agreement between the United States and a foreign entity; and (5) therefore, since there is not a treaty between the United States and the Tribunal which was approved by two-thirds of the Senate, Ntakirutimana's surrender would be unconstitutional. Although there are certain merits to Ntakirutimana's arguments, the Court must ultimately reject his conclusion because it finds no constitutional prohibition on surrenders made pursuant to a statute rather than a treaty.

Ntakirutimana is correct in asserting that the power to extradite stems from the Constitution. The "power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." *Terlinden v. Ames, 184 U.S. 270, 289, 46 L. Ed. 534, 22 S. Ct. 484 (1902).* It is also a correct observation, as discussed below, that the Executive's power to surrender fugitives is limited in that it

must be authorized by some act of Congress. See *Valentine v. United States, 299 U.S. 5, 81 L. Ed. 5, 57 S. Ct. 100 (1936)*. However, as discussed below, it does not follow that because the power to extradite is incident to the Executive's foreign policy powers that it can only be exercised through a ratified treaty. Rather, the Court has concluded that it is within the power of the Executive and Congress to surrender fugitives such as Ntakirutimana under an executive agreement with congressional assent via implementing legislation. The Court reaches this conclusion for the following reasons: (1) there is absolutely no provision in the Constitution that refers either to extradition or the necessity of a treaty to extradite; (2) although the Supreme Court has never addressed this precise issue, it has repeatedly stated that extradition may be effected either by treaty or by statute; (3) there is other precedent wherein fugitives who could not have been extradited by a treaty alone were extradited pursuant to statutes that "filled the gap" left by the treaty provisions; (4) allowing surrender pursuant to either treaty or statute is consistent with the Constitution's provision that treaties and statutes are entitled to equal dignity as the supreme law of the land; and (5) requiring that a treaty be made by the Executive and ratified by the Senate before there can be surrender is inconsistent with (a) the recognition, approval, and validity accorded to executive agreements and (b) the fact that the Executive's power is at its highest when his actions are approved by Congress.

A. The Constitution Sets Forth No Specific Requirements for Extradition

As an initial matter, the Court would point out that there is no mention in the Constitution of extradition or surrender of fugitives. As explained above, courts have found, however, that the power to extradite stems from the foreign relations powers bestowed in Article II, Section 2, Clause 2. See *Terlinden, 184 U.S. at 289*. The clause provides that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds

of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." U.S. Const. art. II, § 2, cl. 17. It is obvious from history and practice that the President constitutionally can engage in a variety of foreign relations activities that do not strictly fall under the rubric of treaty negotiation or appointing ambassadors. The point needs no citation. The question is whether extradition is such an activity. Although the bare text of the Constitution is not particularly helpful on this point, the case law is.

B. Although the Supreme Court Has Held that the Constitution Requires Congressional Authority for Extradition Decisions Made By the Executive, the Court Has Indicated Its Approval of Extraditions Made in the Absence of a Treaty.

1. The Supreme Court Has Repeatedly Stated that an Extradition May be Made Pursuant to Either a Treaty or a Statute.

Although the Supreme Court has never been faced with the precise question of whether a surrender requires an Article II treaty, every indication is that such a treaty is not required. In Valentine v. United States, the Court faced the question of whether the President could extradite a United States citizen to France where the treaty provided that "neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of [the treaty]." *299 U.S. 5, 7, 57 S. Ct. 100, 81 L. Ed. 5 (1936).* The Court concluded that this language alone did not support Executive discretion to surrender a United States citizen. *Id. at 8-18* (noting that a grant to the Executive of discretionary power to surrender citizens of the United States could not be implied). Instead, the Court held that the power to extradite "is not confided to the Executive in the absence of a treaty or legislative provision." *Id. at 8.* More specifically, it noted that the general practice of refraining from extraditing fugitives "in the absence of a conventional or legislative provision" was

sound:

> It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Id. at 8-9.

In searching for legislative authorization of discretionary extradition of United States citizens by the Executive, the Court made it clear that a statutory grant of authority would suffice. In fact, before turning to the language of the treaty itself to determine whether authority might have been granted to the Executive by implication, the Court first examined the general extradition statutes as a possible basis for legislative authority. See *id. at 9-10* (considering and rejecting a general extradition statute as a possible source of legislative authority and noting that "whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory 'occupied by or under control of the United States'"). Finding no statutory authority for Executive discretion, the Court turned to the text of the treaty. See *id. at 10-11* (citing Article VI, Clause 2 of the Constitution, which declares a treaty to be the law of the land, and noting that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision"). Finding that, based on the legislative history and a comparison to other treaties that explicitly granted the missing discretionary power, there was no rule of construction that would allow the Court to supply the omitted grant of power, the Court held that

In determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents. However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens, and not with the courts.

Id. at 17-18 (emphasis added).

That a statute is an equally valid method of effecting an extradition of fugitives has been oft-repeated by the Supreme Court before and since Valentine. For example, in Terlinden, the Court noted that "in the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision." *184 U.S. at 289* (emphasis added). Likewise, in Grin v. Shine, the Court held that it was within the power of Congress to dispense with certain technical requirements of a treaty, and thereby make it possible to extradite criminals not otherwise extraditable under the treaty, since "notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient." *187 U.S. 181, 191, 23 S. Ct. 98, 47 L. Ed. 130 (1902)* (emphasis added) (the treaty with Russia required the production of a copy of a warrant of arrest or other equivalent document issued by a magistrate of the Russian Empire; Congress had dispensed with that requirement).[4]

---

[4] Ntakirutimana distinguishes his case from Grin's broad statement that "Congress has a perfect right to provide for the extradition of criminals in its own way" by noting that in Grin, Congress had merely broadened the

Although Ntakirutimana argues that all of this Supreme Court language concerning statutory extradition is dicta, the Court is reluctant to dismiss this language so easily. After all, the unanimous Court stated the requirement that extradition be authorized by treaty or statute five times in one opinion. See *Valentine, 299 U.S. at 12, 16.* This Court does not believe that such language is accidental. Therefore, at a minimum, the Court finds the repeated references to the propriety of extradition by statute as substantial evidence that the present surrender is likewise proper.

2. The Supreme Court Has Repeatedly Noted that International Law Permits Discretionary Surrender of Fugitives Where There is No Treaty.

As further evidence of the Supreme Court's view that fugitives may be extradited in ways other than by treaty, the Court has often commented on the difference between

---

ability to extradite under the treaty at issue. In other words, since Congress simply made it easier to extradite a criminal to Russia, Ntakirutimana does not believe that Congress would have had the right to make it more difficult to extradite a criminal to Russia because such action would have impermissibly constrained the treaty's provisions. The Court disagrees. As discussed in Section IID, infra at 27, Congress always has the right to pass legislation superseding the terms of a treaty even if the foreign government then complains to the executive -- such a dispute is a political question and has no place in the courts. See *Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888);* see also *Grin, 187 U.S. at 191* (noting that "if Congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian government and of further negotiations") (emphasis added).

obligatory extradition under a treaty and discretionary surrender as a matter of comity. For example, in Factor v. Laubenheimer, the Court explained that while "the principles of international law recognize no right to extradition apart from treaty" and while "the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty," "a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled, and it has been said that it is under a moral duty to do so . . . ." *290 U.S. 276, 287, 54 S. Ct. 191, 78 L. Ed. 315 (1933).* Likewise, in United States v. Rauscher, the Court noted that

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another; and, though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked . . . ."

119 U.S. 407, 411-12, 7 S. Ct. 234, 30 L. Ed. 425 (1886).

Therefore, it is clear that while the Supreme Court has held that the Constitution does require congressional authorization of the Executive's power to surrender fugitives to foreign entities, the Court has never required that the necessary congressional authorization be made in accordance with Article II's ratification procedure. Rather, the Court finds that the Supreme Court's repeated references to (1) the propriety of extradition by statute and (2) the propriety of discretionary surrender in the absence of a treaty to be substantial evidence that Ntakirutimana's surrender under an executive agreement

explicitly authorized by Congress is proper.

C. Other Extraditions Have Been Made By Means Other Than Treaty.

In further support of the proposition that surrender is appropriate under a statute in the absence of a treaty is the fact that extraditions have sometimes been made pursuant to statutes when the fugitive would not have been extraditable under the applicable treaty alone. In one of these cases, Hilario v. United States, the court held that extraditions can be made pursuant to statutes that "fill the gap" left by extradition treaties. In another, Willliams v. Rogers, the court approved of a fugitive's surrender to a foreign country pursuant to a congressionally-authorized executive agreement even though there was no applicable underlying treaty at all.

1. Hilario v. United States

First, in Hilario v. United States, the court faced the post-Valentine question of whether a United States citizen could be extradited pursuant to a general statute that authorized the Executive, in its discretion, to surrender a United States citizen to a foreign country under a pre-Valentine treaty that did not, by itself, confer power on the Executive to extradite American citizens. *854 F. Supp. 165 (E.D.N.Y. 1994).* As the Hilario court explained, Valentine had established that if a treaty contained language excepting a country's citizens from obligatory extradition, that provision alone did not grant the Executive the discretionary power to extradite. See *id. at 168* (the treaty at issue contained a provision that "neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects"); see also *Valentine, 299 U.S. at 10-12* (finding that a treaty exception clause "denying an obligation" to surrender nationals could not fairly be translated into "a grant of power" to surrender citizens). Rather, as the Court in Valentine made clear, an express treaty or legislative provision conferring such power to the Executive was required. See *Valentine, 299 U.S. at 8.* As the Hilario court pointed out, the

decision in Valentine was influenced by the fact that the United States had begun to include empowerment language in certain treaties with citizen exception clauses. *854 F. Supp. at 168* (explaining that these treaties would begin with the standard citizen exception clause, "neither of the contracting parties shall be bound to deliver up its own citizens," but would then continue by noting "but they shall have the power to deliver them up if in their discretion it be deemed proper to do so"); see also *Valentine, 299 U.S. at 12*. In fact, virtually every post-Valentine treaty has contained language ensuring domestic empowerment to surrender citizens by discretion even though there is no obligation under the treaty. *Hilario, 854 F. Supp. at 168-69*.

However, what was at issue in Hilario was the set of pre-Valentine treaties that still lacked the necessary empowerment language for discretionary extradition. *Id. at 169*. As the Hilario court explained, it was not until 1990, over fifty years after the Valentine ruling, that Congress focused its attention on those treaties and sought to cure the empowerment problem through a single piece of legislation. Id. Now codified at *18 U.S.C. § 3196*, the law provides in relevant part:

If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

18 U.S.C.A. § 3196 (West Supp. 1998); see also Section-by-Section Analysis of the National Drug Control Strategy Implementation Act of 1990, 136 Cong. Rec. S6598 (daily ed. May 18, 1990) (because the United States found itself having to refuse to extradite citizens under pre-Valentine treaties which were still in force, the legislation was designed to cure a problem that was "not feasible to address . . . on a piecemeal basis by renegotiating all the pre-Valentine treaties that contained this flaw").

The government in Hilario, therefore, sought to extradite Hilario, a United States citizen, to Portugal under the recently-enacted § 3196 since the treaty with Portugal did not contain the necessary empowerment language. *Id. at 167.* Hilario, however, challenged the constitutionality of the statute and made the same argument that Ntakirutimana now makes in this Court: that the authority to extradite can only be conferred by treaty and that Congress's attempt to confer such power to the Executive by statute is unconstitutional. *Id. at 167.* Specifically, Hilario argued that the statute was an unconstitutional attempt to override a treaty in that "just as a treaty can only be made by the President with the advice and consent of two-thirds of the Senate, so a treaty can only be amended by the same constitutional process." *Id. at 169* (citations omitted).

The Hilario court flatly rejected this argument and found that since Valentine had specifically instructed that "the remedy [to the empowerment problem of pre-Valentine treaties] lies [1] with the Congress or [2] with the treaty making power," Congress had simply chosen the former option and cured the empowerment problem with legislation. See *id. at 173.* The court further explained that the rationale for the Supreme Court's endorsement of these alternatives was clear: "Both statutes and treaties are the supreme law of the land. Thus, either can serve the Constitution's requirement for a specific legal conferral of the power to extradite." Id. (citations omitted).

The court also rejected Hilario's argument that the power to extradite must be conferred in accordance with the treaty making provisions of Article II, Section 2, Clause 2 of the Constitution since (1) the argument suffered from the "fundamental problem" of having "no authority to support it" and (2) the argument was, "of course, at odds with the repeated statements by the Supreme Court in Valentine that the power to extradite United States citizens may be conferred on the executive either by statute or by treaty." Id. Although Hilario had dismissed the Supreme Court's statements in

Valentine as dicta, the Hilario court believed that the Supreme Court's endorsement of the statutory option was not mere dicta since the Court "did not begin its search for legal empowerment with the treaty. It first reviewed various federal statutes relating to extradition. Only upon finding no statutory conferral of power did the Court state that its focus would necessarily narrow to the extradition treaty." *Id. at 173-74* (citations omitted). Finally, the court noted that "even if this were dictum, when a unanimous Supreme Court repeats it five times in a single opinion, a district court must pay heed." *Id. at 174* (quoting each of the five times that the Supreme Court endorsed the statutory alternative to extradition).

2. Williams v. Rogers

Furthermore, in Williams v. Rogers, the court upheld the transfer of an American airman to the Philippines for trial even though there was not a treaty between the *Philippines and the United States. 449 F.2d 513 (8th Cir. 1971)*, cert. denied, *405 U.S. 926 (1972)*. In Williams, an enlisted member of the United States Air Force was inadvertently transferred to the United States even though he was supposed to have been confined in the Philippines pending his trial for the forcible abduction of a female Philippine national. *Id. at 515.* When the Air Force sought to return Williams to the Philippines, Williams sought an injunction of his transfer, arguing that the attempt to return him to the Philippines was an unlawful attempt to extradite him in the absence of a treaty between the United States and the Philippines. *Id. at 519-20.*

The court held, however, that such a transfer was appropriate since it was provided for by an executive agreement that was specifically authorized by a joint resolution of Congress. *Id. at 520-21 & n.12* (characterizing the applicable agreement as "an unratified executive agreement formulated pursuant to a concededly valid delegation of legislative authority"). The court recognized Valentine's holding that the Executive possesses no power to extradite fugitives except such as is conferred by treaty or by Act of

Congress and found that the agreement at issue met Valentine's requirements since the joint resolution giving rise to the agreement entrusted the President with authority to negotiate criminal jurisdiction arrangements and such authority included the correlative power to enforce the obligations of our servicemen undertaken pursuant to the agreement. *Id. at 521* (stating that the holding in Valentine "requires only that there be a showing of some authority, whether in the form of congressional dictate or policy, or the provisions of an existing treaty, to provide a legitimate basis for the surrender of fugitives from justice by this country to another").

These cases clearly support a finding that surrender of a fugitive to a foreign entity is constitutional if made by the Executive pursuant to some type of Congressional authority. Although Ntakirutimana attempts to distinguish his case from Hilario, by noting the existence in Hilario of an underlying treaty, and from Williams, by pointing to the special circumstances involved in Congress's regulation of the armed forces, the Court is not persuaded by these distinctions. The language in these cases clearly supports the propriety of a statutory basis for extradition and Ntakirutimana offers no authority to the contrary.

D. Allowing Surrender Pursuant to Statute is Consistent with the Constitution's Mandate that Treaties and Statutes Be Treated with Equal Dignity.

A fundamental problem with Ntakirutimana's argument that a statute is insufficient to extradite absent a treaty is its implicit assumption that treaties are somehow superior to statutes. The Constitution clearly provides, however, that they are not. Article VI, Clause 2 provides that both statutes and treaties are the supreme law of the land. Although Ntakirutimana has questioned what possible purpose the Article II ratification process serves, if the same can be accomplished through executive agreement with a majority vote of Congress, he is wrong to conclude that the difference between a statute and a treaty is its legal effect. See *Whitney*

v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [If a self-executing treaty and statute] are inconsistent, the one last in date will control the other . . . .").

Rather, what distinguishes treaties from statutes are the types of obligations assumed by the United States. With a treaty, the United States obligates itself by contract to perform certain obligations enforceable by a foreign country. See id. (a treaty, unlike a statute, "is primarily a contract between two or more independent nations"). On the other hand, a statute merely defines domestic decisions, unenforceable by a foreign entity. See *Hilario, 854 F. Supp. at 171* (noting that the language of § 3196, the statute which empowers the Secretary of State to exercise the discretion to extradite United States citizens, is not inconsistent with the treaties which deny the obligation of extraditing nationals since the statute's "legal scope is domestic, not international" and the decision to extradite a citizen, when not obligated by treaty, is a "domestic circumstance").

That a treaty is not superior to a statute is also clear from the well-settled principle that a statute can always overrule a treaty if it is the last in time. See *Whitney, 124 U.S. at 194* ("If the treaty contains stipulations which are self-executing, . . . to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether.") Of course, a country may become dissatisfied with the United States if Congress overrides a treaty with legislation, but such is not a matter for the courts. See id. ("If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the

complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.").

Therefore, as statutes are equal in dignity to treaties, there is no basis for arguing that the power to extradite can be incident only to a treaty ratified by two-thirds of the Senate. Rather, where there is no other basis in the Constitution for holding that a voluntary and discretionary extradition (as opposed to an obligatory extradition, enforceable by a foreign country) requires the existence of a treaty, the fact that a treaty has different constitutional requirements than a statute is not a sufficient basis to require the existence of a treaty for extradition.

E. Allowing Surrender Pursuant to an Executive Agreement that Has Been Approved by Congress is Consistent with the Weight Accorded (1) Executive Agreements and (2) Any Executive Action that Enjoys Congressional Support.

Part of Ntakirutimana's argument is that the power to surrender must be exercised pursuant to a ratified treaty since the power to surrender a fugitive stems from the foreign relations powers bestowed by Article II of the Constitution. A flaw with this argument is that even though the bare language of Article II, Section 2, Clause 2 refers to activities requiring Senate ratification, courts have found that (1) the President has the power under Article II to enter into unratified executive agreements and (2) those agreements are valid. Although "the authority to enter into executive agreements derives from the power over foreign relations accorded to the President by the Constitution," see *United States v. Walczak, 783 F.2d 852, 855 (9th Cir. 1986)*, "the Supreme Court has recognized that of necessity the President may enter into certain binding agreements with foreign nations not strictly congruent with the formalities required by the Constitution's Treaty Clause." Id. (citing *Weinberger v. Rossi, 456 U.S. 25, 30, 71 L. Ed. 2d 715, 102 S. Ct. 1510 (1982)).* Noting that "the Supreme Court has never held an executive agreement

ultra vires for lack of Senate consent," the Walczak court upheld the validity of an executive agreement authorizing United States customs "preclearance" operations at various Canadian airports even though Congress had not specifically authorized the President to enter into such agreements. *Walczak, 783 F.2d at 855-56* (concluding that the agreement was among those which the President may conclude on his own constitutional authority since it was designed to implement the goals of an Article II treaty, though not specifically authorized by that treaty).

But even more than recognizing the validity of some executive agreements where there is no indication of Congressional support, the Supreme Court has held that "when the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore v. Regan, 453 U.S. 654, 668, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981)* (quoting *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, 96 L. Ed. 1153, 72 S. Ct. 863 (1952)* (Jackson, J., concurring)).

In this case, Ntakirutimana asks the Court to find that his surrender, an action to be undertaken by the Executive and explicitly approved by Congress, is unconstitutional. Since the Constitution does not speak of extradition and the Court is without a solid basis to doubt that the power to extradite lies in the democratic branches by virtue of either treaty or statute, the Court finds that Ntakirutimana's surrender under § 1342 of Public Law 104-106 is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." Under the circumstances of this case, the Court finds that Ntakirutimana has not sustained that heavy burden.

Finally, the Court would point out the disturbing consequences of a finding that Congress and the President are, together, powerless to surrender a fugitive without negotiating a treaty with a foreign entity. As the Lawyers Committee for Human Rights ("LCHR") aptly noted in its brief, such a holding represents "an unprecedented limitation on the sovereignty of the United States and the ability of its political branches to carry out foreign policy" since it "condition[s] the authority of the political branches to formulate extradition policy for the United States on their ability to negotiate treaties with foreign nations and international bodies." Amicus Curiae Brief of LCHR, pp. 18-19. The Court agrees with this statement. Moreover, the Court believes that "[a] contrary ruling would mean that the Federal Government as a whole lack[s] the power [sought to be] exercised by the President, and that [the Court is] not prepared to say." *Dames & Moore, 453 U.S. at 674* (citations omitted). For all of the above reasons, the Court finds (1) that the Constitution does not require the existence of a treaty for surrender of a fugitive to a foreign entity and (2) that, under Valentine and its progeny, § 1342, and the executive agreement that it implements, are constitutional bases for Ntakirutimana's surrender to the Tribunal.[5]

---

[5] The Government has also argued that, to the extent that a treaty is required for Ntakirutimana's surrender to the Tribunal, the treaty between the United States and the United Nations is sufficient since it obligates the United States to implement legislation in support of Security Council resolutions. Since the Security Council determined in Resolution 955 that countries should surrender war criminals to the Tribunals for the former Yugoslavia and Rwanda, the Government argues that the treaty obligated the United States to pass the necessary implementing legislation.

Although the Court need not reach this issue since it has found that a treaty is not necessary for Ntakirutimana's

III. PROBABLE CAUSE

In reviewing a surrender request, the case law, the statute and the surrender agreement all require an extradition judge to apply the "probable cause" standard to determine whether an individual is extraditable. See *Escobedo v. United States, 623 F.2d 1098, 1102* (5th Cir.) (test is "the existence of probable cause to sustain the charges against [the extraditee] 'or, in other words, the existence of a reasonable ground to believe the accused guilty'"), cert. denied, *449 U.S. 1036, 66 L. Ed. 2d 497, 101 S. Ct. 612 (1980); 18 U.S.C. § 3184* (requires the judge to determine whether the evidence is "sufficient to sustain the charge under the provisions of the proper treaty or convention or under § 3181(b)"); Surrender Agreement, art. 2, P3 (the evidence must be "sufficient to establish [that] "there is reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested"). Having found that the Surrender Agreement and § 1342 of Public Law 104-106 are, together, a constitutional basis for surrender of fugitives to the Tribunal for Rwanda, the Court now turns to an analysis of the Government's evidence in order to determine whether there is probable cause to sustain the charges such that Ntakirutimana may be surrendered.

A. The Government's Evidence of Probable Cause

In support of its request for surrender, the Government submitted the Declaration of Arjen Mostert, a police officer

---

surrender, it disagrees that the treaty with the United Nations can properly be characterized as an extradition treaty since it does not mention extradition. However, the presence of this treaty does support the Court's finding that the executive agreement was fully supported by Congress, both before and after the agreement was executed.

from Holland who was employed as an investigator for the Tribunal for six months during 1996. After his declaration was challenged by both Ntakirutimana and Magistrate Notzon, Mostert has recently submitted a supplemental declaration. Additionally, the Government has submitted the Declaration of Pierre-Richard Prosper, an Assistant Trial Attorney for the Office of the Prosecutor for the Tribunal and a former Assistant United States Attorney from the Central District of California. The Prosper declaration was offered in this case as a clarification in response to Magistrate Notzon's concerns. There is no dispute that all three of the declarations have been properly authenticated by either the Ambassador of the United States of America at Kigali, Rwanda (the site of the office of the Prosecutor for the Tribunal) or the Ambassador of the United States to the Netherlands (the site of the Hague, where the Tribunal's Prosecutor is based). See Pub. L. No. 104-106, § 1342(a)(2). Together, these declarations summarize the Government's evidence in support of its request for surrender. In Mostert's lengthy declaration he provides both background information concerning the events in Rwanda during 1994 and the evidence that specifically implicates Ntakirutimana.

1. Factual Background About the Events in Rwanda During 1994

As background, Mostert explains that the Rwandan conflict was precipitated by years of ethnic strife in a country where 84% of the population was Hutu and 14% was Tutsi. On April 6, 1994 President Habyarimana, along with the President of Burundi and other government officials, were killed when their aircraft crashed upon approach to the airport in Kigali, Rwanda.[6] Following this event, a massive wave of killing took place in Rwanda that resulted in the deaths of an

---

[6] However, there were also reports that the plane had been shot down by artillery.

estimated 500,000 to one million individuals. Initial investigation by the United Nations, various governments, journalists and non-governmental organizations established overwhelming evidence that the execution of Tutsis by Hutus was planned months in advance of the plane crash, was motivated by ethnic hatred and was committed with the intent to destroy, in whole or part, the Tutsi minority. Most of the acts were carried out by members of Hutu militia groups, members of the transitional government of Rwanda, local leaders, members of the national police, communal police, civilians and other pro-Hutu sympathizers.

2. The Evidence Against Ntakirutimana

Mostert's declaration also summarizes the specific evidence that Ntakirutimana committed the genocidal crimes charged in the Tribunal indictments. Essentially, this evidence is the testimony of ten[7] witnesses who say that they observed Ntakirutimana participating in or planning the attacks against Tutsis at the Mugonero Complex and, later, in the Bisesero region, an area to which many survivors of attacks had fled. Mostert has declared that the witnesses are all ordinary civilians; they have never been informants and they art not receiving any consideration in exchange for their testimony. Because of security concerns, the witnesses have been identified only by letter. This is consistent with the Tribunal's policy of protecting witnesses. Detailed summaries of each witness's statement, as related by Mostert, are provided as an Appendix to this opinion. However, the Court will generally summarize the witnesses' statements as they relate to the

---

[7] Mostert's original declaration indicated that there were twelve witnesses. However, he has clarified in his supplemental declaration that two of the twelve witnesses provided only general information not directly implicating Ntakirutimana. Summaries of their statements are included, however, in the Appendix to this opinion.

attacks upon which the two indictments are based.

a. The Massacre at the Mugonero Complex

Essentially the evidence that Ntakirutimana planned and participated in the attack on Tutsis at the Mugonero Complex is based upon the statements of eight witnesses. Several of these witnesses merely observed Ntakirutimana meeting with other co-indictees before the massacre. Several witnesses also recall Ntakirutimana's negative response to pleas for help from Tutsis who were in hiding in the Mugonero Complex. More damaging, however, are five witnesses' recollections that it was Ntakirutimana himself who had encouraged Tutsis to seek refuge at the Complex. In fact, Witness C said that Ntakirutimana specifically told him to go into the bushes and encourage Tutsis already in hiding to come to the Complex. At Ntakirutimana's direction, Witness C brought approximately 50 people to the Complex.

Three of the witnesses also recall that Ntakirutimana was present at the massacre and that he was armed and in the company of those attacking the Tutsis. In fact, Witness H stated that it was Ntakirutimana's car that led the group of attackers. Most significantly, Witness H stated that he observed Ntakirutimana shooting at a group of Tutsis in the Complex and that he watched as those in the group died. Witness H is also quoted as having said that he heard Ntakirutimana say to other attackers, "Kill them all."

b. The Bisesero Massacres

The Government's evidence that Ntakirutimana planned and participated in the attacks on Tutsis who were hiding in the Bisesero region following the Mugonero massacre also stems from witness statements. Witnesses C, D, I, and L have said that they observed Ntakirutimana transporting attackers into the Bisesero region on a regular basis over several months for the purpose of finding and killing Tutsis in hiding. Specifically, Witness D said that he saw Ntakirutimana transporting the

attackers into and out of Bisesero "almost every day." Witness D also said that he observed Ntakirutimana providing food and drink to the groups armed with military-type weapons. Likewise, Witnesses C and I saw Ntakirutimana's car transporting attackers "virtually every day" during this time.

Moreover, while Witnesses C and H were hiding near a church in the Bisesero region, they saw Ntakirutimana arrive with a group of soldiers and heard Ntakirutimana tell them to remove the roof from the church so that it could not be used as a hiding place for the Tutsi "dogs." Witness C then saw the soldiers destroy the roof.

But most damaging is Witness L's statement. Witness L, who, prior to the President's plane crash had regularly attended Ntakirutimana's church, was in hiding in Bisesero. He told of seeing armed groups enter the region every day and kill Tutsis in hiding; those killed included some members of his own family. Witness L said that he saw Ntakirutimana in his white Toyota pickup truck, on at least four occasions, searching for Tutsis in hiding. He said that on every occasion, the truck was filled with armed civilians or armed soldiers. He stated that Ntakirutimana led the group of soldiers and that they followed his orders. On one occasion, Witness L saw Ntakirutimana locate hiding Tutsis, point out their location to the attackers and then instruct the attackers to kill them.

c. Additional Corroborating Information

Throughout his declaration, Mostert also provides additional information which he learned from many other witnesses and sources which tends to corroborate the accounts described by the above witnesses. With respect to the Mugonero massacre, he explains that Kibuye, the prefecture in which the Mugonero Complex and the Bisesero region are located, is one of eleven prefectures within Rwanda. He visited the Kibuye Prefecture, including the Mugonero Complex and the Bisesero region, more than 20 times for investigative purposes. The Complex consists of several buildings, including a church, an infirmary

and a hospital. Based on his observations of the Complex, he estimates that it was four to five acres in size. He states that it is not surprising that not all witnesses observed all aspects of the massacre, given the Complex's size and the fact that many of the witnesses were in a constant state of motion during the attack. Additionally, he states that numerous witnesses can confirm the general accuracy of the descriptions provided by Witnesses A through L.

Mostert's personal investigation of the Bisesero region also confirms the general descriptions given by witnesses to the events in Bisesero. During his visits to the Kibuye Prefecture, Mostert observed that Bisesero is a very mountainous area that is difficult to access by automobile or truck since it has very few roads -- all of which are unpaved. He further observed that because these few roads cross exposed mountain slopes, convoys of vehicles can easily be viewed from the surrounding mountains within the Bisesero region. Many Tutsi survivor-witnesses told Mostert that they and others fled to this area because they felt the mountainous terrain offered a better environment in which to hide. These witnesses also confirmed that the attacks on Tutsi people in the Bisesero area continued from April through June 1994. They also generally told Mostert that convoys of vehicles carrying armed people entered the Bisesero region on a daily basis during this time until French troops entered a number of southern Rwandan Prefectures, including Kibuye, in order to establish a safe haven for Tutsi refugees. These witnesses also stated that prior to the arrival of the French troops, the armed people in the convoys searched throughout the Bisesero region to hunt down and kill Tutsis who were in hiding.

B. Ntakirutimana's Objections to the Government's Evidence of Probable Cause

1. The Government has Satisfactorily Responded to Ntakirutimana's and Magistrate Notzon's Earlier Evidentiary Objections.

In this proceeding and in the proceeding before Magistrate Notzon, Ntakirutimana has raised a litany of objections to the evidence. Essentially, he has attempted to attack the evidence as unreliable and incredible because of a number of concerns about the manner in which the witness interviews were conducted. Magistrate Notzon concurred with many of these concerns. Essentially, Magistrate Notzon's concerns about the investigative tactics and witness interviews included the following: (1) the witnesses were not sufficiently identified and Mostert never stated either that the witnesses had given reliable information in the past or that, in his experience, he found them to be reliable; (2) there was no indication of how the interviews were conducted since the witnesses presumably spoke the language of Rwanda, Kinyarwanda, and there was no indication that the interviewers were fluent in that language; (3) Mostert did not indicate that the witnesses had made their statements under oath; (4) Mostert did not specify the conditions under which the witnesses made photograph identifications; (5) although it was obvious that at least one witness had been interviewed multiple times, Mostert did not explain the reason for multiple interviews, nor did he identify the specific interviews during which the witnesses made incriminating statements; and (6) Mostert did not specify at what point in the investigation of Ntakirutimana the interviews were conducted.

In the Government's second request for surrender, the Government has substantially answered Magistrate Notzon's objections by submitting Prosper's declaration and Mostert's supplemental declaration; these documents clarify several issues:

a. Witness Reliability

All of the witnesses were Tutsi except for one witness who was Hutu. Prosper believes the witnesses to be reliable because (1) the witnesses were ordinary citizens, not informants; (2) their statements corroborate each other and tell a consistent story as to the timing of the attacks, the location

of the attacks, and the actions of Ntakirutimana and other individuals; and (3) in his review of the statements, he has discovered no evidence to indicate that any of the witnesses had a reason to lie.

b. Languages and Interpreters

During the interviews, the witnesses spoke in their native language Kinyarwanda, except for Witness B who was interviewed in French by a French speaking investigator. Those speaking Kinyarwanda were interviewed with an interpreter who translated into either English or French depending on the language of the investigator. Further, Prosper has stated that he speaks both English and French fluently and that after speaking with each of the investigators, he can affirm that the investigators spoke that particular language fluently.

c. Indicia of Accuracy and Reliability of Statements

The statements contain several indicia of reliability. First, at the close of each interview, the policy of the Office of the Prosecutor was to read back the statement to the witness for accuracy. The twelve witnesses were subjected to that process and all of them, with the exception of Witness I who did not sign his supplemental statement, signed their statement and a "Witness Acknowledgment Form" affirming that the statement was true to the best of their knowledge and recollection and that the statement was given voluntarily with the knowledge that it may be used in a legal proceeding.

Additionally, Mostert, the affiant in this proceeding, personally interviewed Witnesses A, C, H, and L, three of which (Witnesses C, H, and L) are key witnesses to the most grievous aspects of Ntakirutimana's alleged conduct in

Mugonero and/or Bisesero.[8] In the interviews Mostert conducted, he was accompanied by an interpreter who translated the witnesses' Kinyarwandan statements into English for him. He used a different interpreter for the interviews with witnesses A and L than the interpreter he used for witnesses H and C. The interpreters he used for the interviews had also interpreted for him in a large number of other interviews and he says that in his experience "they appeared to interpret correctly." He also stated, "Based on the manner in which they interacted with the witnesses, the length of time it took to translate compared to the question or response, and the clarification they provided if I asked about the manner in which they had interpreted a question or answer, I believe that the translations were acceptably accurate."

d. The Photograph Identifications

The photo identifications made by Witnesses A, B, C, H, and L were merely confirmatory in nature. Prior to being shown the photo, all of these witnesses (1) had stated that they were familiar with Ntakirutimana and (2) had provided a consistent physical description of Ntakirutimana.

---

[8] Witnesses C and H observed Ntakirutimana instruct soldiers to remove the roof of a church in Bisesero to prevent its being used as a hiding place, Witness H observed Ntakirutimana shooting at a group of Tutsis at the Mugonero complex and instructing others to "kill them all," and Witness L observed Ntakirutimana assisting soldiers in locating Tutsis in hiding in Bisesero and instructing the soldiers to kill them.

Mostert's summaries of the remaining witnesses's statements were based on his review of their statements made to other investigators and on his review of the investigators' reports.

e. The Use of Multiple Interviews

Many of the witnesses in the Kibuye investigation were interviewed on several occasions between October 1995 and July 1996. While initial interviews were general, focusing on the overall events in Kibuye and a large number of perpetrators, the latter interviews were more narrowly focused.

The Court finds that the Government has substantially and satisfactorily addressed Magistrate Notzon's reservations concerning the reliability of the witnesses' statements. The only matter left unanswered is the question of when the interviews were conducted in relation to the progress of the Tribunal's investigation of Ntakirutimana. However, for the reasons stated below in Section IIID the Court does not believe that the omission of this detail is significant to the probable cause determination at hand.

2. Ntakirutimana's Objections to Mostert's Declaration as a Whole

Prior to the filing of Mostert's supplemental declaration, Ntakirutimana also articulated suspicions concerning Mostert's declaration and his role in the investigation. Specifically, he speculated that (a) the declaration submitted by the Government was inaccurate and/or incomplete because the declaration ended abruptly and concluded with a signature page that appeared to have a different font, and (b) Mostert could not have completed such a thorough investigation in only six months. Mostert's supplemental declaration answers these allegations.

With respect to Ntakirutimana's speculation that Mostert's original declaration might be incomplete or altered, Mostert now states that his original declaration is complete and unaltered. With respect to Ntakirutimana's allegation that Mostert did not properly declare that he was telling the truth under penalty of perjury, Mostert has now initialed each page

of the original declaration and affirmed that at the time he executed the declaration he undertook to tell the truth. Further, he reaffirms that he was and still is telling the truth and that he is aware that he could be prosecuted by the Tribunal under Rule 91 for an intentionally false statement. He states that he is also prepared to declare under penalty of perjury under the laws of the United States that his statements are true and correct.

Second, with respect to Ntakirutimana's speculation that Mostert could not have done a thorough investigation after just six months as an investigator, Mostert reaffirms that his statements concerning his investigations have been truthful and that his work as a Tribunal investigator was very intensive. Given Mostert's explanations, the Court finds Ntakirutimana's objections to Mostert's original declaration more than satisfactorily answered.

3. Ntakirutimana's Remaining Objections

As explained above, most of Ntakirutimana's and Magistrate Notzon's earlier concerns have been resolved by the Prosper declaration and Mostert's supplemental declaration. However, Ntakirutimana continues to have several remaining objections. He believes that the following problems render the witnesses' statements so unreliable as to negate a finding of probable cause: First, he raises concerns about how the witness interviews were conducted. He argues that since there was no particular requirement or certification of skill and proficiency of the interpreters and since there was no screening of the interpreters for bias, there is a high risk that the translated statements are inaccurate and the result of biased interpretation. Additionally, he points to the fact that the translators did not vouch for the accuracy of their work; they merely signed a certification stating that they translated the interview. Likewise, he complains that the procedure of reading the statements back to the witnesses and having them sign their statements is fraught with risks for inaccuracy since the witnesses were approving statements made in English or

in French and the interviews were not recorded with audio or video equipment.

Ntakirutimana also raises concerns about when the interviews were conducted in relation to the investigation of Ntakirutimana. He is especially concerned that the witnesses may have felt pressured by the Rwandan government in previous interrogations. He also continues to believe that Mostert's declaration lacks credibility. Finally, he finds it suspicious and significant that the Tribunal, and the United States, have twice withheld the actual witness statements from review by the Court.

C. The Probable Cause Standard

Again, in determining whether a fugitive may be surrendered the Court must determine whether there is probable cause to sustain the charges against the extraditee. See *Escobedo v. United States, 623 F.2d at 1102; 18 U.S.C. § 3184;* Surrender Agreement, art. 2, P3.

1. The General Nature of an Extradition Proceeding

Of course, the "probable cause" standard does not require evidence sufficient to convince the judge that the individual is guilty, but only evidence sufficient to furnish "good reason to believe that the crime alleged had been committed by the person charged with having committed it." *Jimenez v. Aristeguieta, 311 F.2d 547, 562 (5th Cir. 1962)* (quoting *United States v. Burr, 25 F. Cas. 2, 12 (C.C.D. Va. 1807)* (No. 1469a) (John Marshall, C.J., sitting as committing magistrate in the treason prosecution of Aaron Burr)), cert. denied, *373 U.S. 914 (1963);* see also *Collins v. Loisel ("Loisel I), 259 U.S. 309, 316, 66 L. Ed. 956, 42 S. Ct. 469 (1922)* ("The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction."); *Peters v. Egnor, 888 F.2d 713, 717 (10th Cir. 1989)* (same);

Sidali v. Immigration and Naturalization Service, 107 F.3d 191, 199 (3d Cir. 1997) ("It is not necessary in extradition proceedings that the evidence against the respondent be such as to convince the committing judge or magistrate of his guilt beyond a reasonable doubt, but only such as to afford reasonable ground to believe that the accused is guilty of the offense charged."); *Austin v. Healey, 5 F.3d 598, 605 (2d Cir. 1993)* (finding that the evidence was sufficient to support probable cause even though it was "circumstantial" and "less than overwhelming" since "the foreign government is not required to present its entire case in this country"), cert. denied, *510 U.S. 1165, 127 L. Ed. 2d 542, 114 S. Ct. 1192 (1994)*.

Therefore, in applying the probable cause standard, an extradition judge must keep in mind that an extradition proceeding should not resemble a full-blown trial. See *Jimenez, 311 F.2d at 556* (the extradition proceeding "is not a trial of the guilt or innocence but of the character of a preliminary examination held before a committing magistrate to determine whether the accused shall be held for trial in another tribunal"). The limited nature of an extradition proceeding has made it difficult for courts to determine (1) what evidentiary standards should apply in extradition proceedings, (2) the degree to which fugitives should be allowed to introduce evidence on their behalf, and (3) the degree to which fugitives should be allowed to contradict the Government's offers of proof.

2. Section 3190 and Admissibility of the Government's Evidence

First, courts have held that the standard of admissibility of evidence is quite lenient in extradition proceedings. In fact, evidence which would not otherwise be admissible is often admissible in the extradition context. Most significantly, *18 U.S.C. § 3190* provides that documents authenticated by the demanding government's authorities, so as to be admissible for similar purposes in tribunals of the demanding government,

"shall be received and admitted as evidence" at an extradition hearing in this country "for all the purposes of such hearing," and the certification of the principal United States diplomatic or consular officer in the demanding nation "shall be proof" that the documents are so authenticated. *18 U.S.C.A. § 3190* (West 1985); see also Pub. L. No. 104-106, § 1342(a)(2) ("For purposes of applying section 3190 . . . in accordance with [surrenders to the Tribunal] the certification referred to in that section may be made by the principal diplomatic or consular officer of the United States resident in such foreign countries where the International Tribunal for Rwanda may be permanently or temporarily situated.").

In accordance with this lenient admissibility standard, courts have held that hearsay statements can be considered as competent evidence. See *Escobedo, 623 F.2d at 1102, n.10* ("Hearsay . . . is permitted in extradition proceedings."). For example, a prosecutor's or an officer's summary of hearsay statements by affidavit is competent evidence sufficient for a finding of extraditability as long as the affidavit is authenticated. See *Emami v. United States Dist. Ct. for the N. Dist. of Cal., 834 F.2d 1444, 1451 (9th Cir. 1987);* see also *In re Marzook, 924 F. Supp. at 592* (refusing to entertain objections to "multiple hearsay"). Likewise, unless the extradition treaty requires that witnesses' statements be made under oath, the hearsay statements to which the affiant refers need not have been made under oath or after receiving warnings of consequences for giving a false statement. *Emami, 834 F.2d at 1452;* see also *Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984)* (where (1) a police officer's report summarizing hearsay statements was properly authenticated, (2) the report was prepared on the basis of notes from recorded interrogations, and (3) the witnesses had approved either the tape or the notes, the court found the report both admissible and reliable as the statements had indicia of reliability (such as statements against penal interest)); *Bovio v. United States, 989 F.2d 255, 259-60 (7th Cir. 1993)* (finding that a witness's statement was sufficiently corroborated but noting that the extraditee "had no right to

attack the credibility of [a witness since] issues of credibility are to be determined at trial," and, therefore, the court refused to entertain further objections to a witness statement even though the statement was made five years after the investigation and there was no record of original notes from witness interviews).

3. Restrictions on the Extraditee's Ability to Offer Evidence

Additionally, the nature of an extradition proceeding restricts the extraditee's ability to offer evidence. The restriction manifests itself both in terms of what evidence the fugitive is allowed to introduce in his defense and in terms of the extent to which the fugitive may offer evidence that contradicts the government's proof. Although the law is not settled concerning precisely how extradition judges should make these evidentiary rulings, several principles emerge. First, courts are in agreement that a fugitive is not allowed to offer evidence that goes simply to his defense. See, for example, *Jimenez, 311 F.2d at 556.*

Second, although the fugitive "may offer limited evidence to explain elements in the case against him," id., courts generally hold that "the extraditee's right to introduce evidence is 'limited to testimony which explains rather than contradicts the demanding country's proof, and its precise scope is largely in the [extradition judge's] discretion.'" *Shapiro v. Ferrandina, 478 F.2d 894, 905* (2d Cir.), cert. dismissed, *414 U.S. 884 (1973);* see also *Eain v. Wilkes, 641 F.2d 504, 511* (7th Cir.), cert. denied, *454 U.S. 894, 70 L. Ed. 2d 208, 102 S. Ct. 390 (1981); Hooker, 573 F.2d at 1369* ("Admission of evidence proffered by the fugitive at an extradition proceeding is left to the sound discretion of the court, guided of course by the principle that evidence of facts contradicting the demanding country's proof or establishing a defense may properly be excluded."). The most clear example of this principle is the rule that a fugitive has no right to cross-examine witnesses. See, for example, *Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1406-07 (9th Cir. 1988)* (likening extradition proceedings to

grand jury proceedings), cert. denied, *490 U.S. 1106, 104 L. Ed. 2d 1020, 109 S. Ct. 3157 (1989).*

But the more subtle contours of the "contradictory evidence" versus "explanatory evidence" distinction have been ill-defined by courts. Courts have explained that "the distinction between 'contradictory evidence' and 'explanatory evidence' is difficult to articulate. However, the purpose behind the rule is reasonably clear. In admitting 'explanatory evidence,' the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause." *In re Requested Extradition of Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978).* Likewise, another court has explained that "what tends to obliterate probable cause may be considered but not what merely contradicts it. The improbability or the vagueness of the testimony may destroy the probability of guilt, but the tendering of witnesses who testify to an opposite version of the facts does not. The latter must await a trial on the merits." *Shapiro v. Ferrandina, 355 F. Supp. 563, 572 (S.D.N.Y. 1973),* aff'd as modified, *478 F.2d 894 (2d Cir. 1973),* cert. dismissed, *414 U.S. 884 (1973).* "Thus," another court held, "the extraditee cannot avoid extradition simply by contradicting the requesting country's case. Rather, the extraditee must 'negate' or 'obliterate' the requesting country's showing of probable cause." *Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 995 (S.D. Fla. 1990)* (explaining that "in order to 'negate' [the demanding country's] showing of probable cause, [the extraditee] must discredit the testimony relied upon by [the demanding country] to the extent that this Court can find that there is not 'any evidence warranting the finding that there was reasonable ground to believe the accused guilty'") (quoting *Quinn v. Robinson, 783 F.2d 776, 790* (9th Cir.), cert. denied, *479 U.S. 882, 93 L. Ed. 2d 247, 107 S. Ct. 271 (1986)),* aff'd, *932 F.2d 977 (11th Cir. 1991).*

4. The Propriety of Credibility Challenges

What is somewhat unclear from the case law is whether and to what extent an extradition judge should consider challenges to credibility and reliability of the government's proof in making determinations of probable cause.

a. Some Courts Indicate that Extradition Judges May Consider Credibility Challenges.

Many courts, including the Fifth Circuit Court of Appeals, have hinted that considerations of credibility are within an extradition judge's discretion. See *Garcia-Guillern v. United States, 450 F.2d at 1192* (stating that while the habeas court determines "whether there is any competent evidence tending to show probable cause," consideration of the "weight and sufficiency of that evidence is for the determination of the committing court"); *Escobedo, 623 F.2d at 1102, n.10* ("the credibility of the reported [photo] identification is a matter committed to the magistrate and is not reviewable on habeas corpus"); *Quinn, 783 F.2d at 815* ("The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate."); *Austin, 5 F.3d at 605* (noting (1) that it is within the magistrate's province to consider credibility and (2) that the magistrate made a specific finding that, although certain affidavits contained hearsay, the information was reliable because of the "level of consistency"); *Freedman v. United States, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977)* (agreeing with the extraditee's theory that since "a magistrate[,] in making a determination as to whether a search warrant should issue on the basis of an affidavit[,] should involve himself in a determination as to the reliability of the affidavits presented and not merely blindly believe such statements without regard to the underlying facts upon which the officer believed that the information was reliable," neither should an extradition magistrate "wholly ignore the credibility and reliability of the complaining witness or affiant").

b. Some Courts, However, Regard Credibility Challenges as "Contradictory Evidence" and Refuse to Consider Them in

Making Probable Cause Determinations.

On the other hand, within the "contradictory" versus "explanatory" framework, many courts have found that credibility determinations are among the contradictory evidence that should be excluded at extradition proceedings. One court has held flatly that "an accused in an extradition hearing has no right to contradict the demanding country's proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof." *Eain, 641 F.2d at 511.* Another court agreed that an extradition "judge's refusal to examine the credibility of the testimony and statements included in the translated material was clearly proper, since the declarants were not before him." *Shapiro, 478 F.2d at 904-905* (the extradition judge had said that the extraditee's assertion was "a matter of credibility and that is an issue that I don't have to pass on"); see also *In re Extradition of Atta, 706 F. Supp. 1032, 1052 (E.D.N.Y. 1989)* (finding the government's evidence credible but noting that "even if the record required a different conclusion regarding the credibility of the confessions, challenges to evidence submitted by the United States in an extradition proceeding are not permissible").

Likewise, another court indicated that while it would consider credibility challenges if the extraditee succeeded in discrediting certain testimony to the extent that the court could find that there was not "any evidence warranting a finding that there was reasonable ground to believe the accused guilty," where there is merely "some doubt as to the credibility" of a witness, the court should not consider such challenges since "the appropriate acid test for his testimony must take place at a trial on the merits . . . ." *Cheng Na-Yuet, 734 F. Supp. at 996* (finding that the discrepancies between witness statements did not "wholly discredit" either witness); see also *Republic of France v. Moghadam, 617 F. Supp. 777, 782-83 (N.D. Calif. 1985)* (noting generally that "the court may exclude evidence which merely contradicts government testimony [or] poses conflicts of credibility," but finding that

recantation evidence had to be given substantial consideration because it had more indicia of reliability than earlier statements and "it [went] to more than just the credibility of a witness, [as] it negated the only evidence of probable cause").

c. Other Courts Refuse to Consider Credibility Challenges if the Evidence is Otherwise Admissible.

Other courts have refused to consider challenges to the reliability and competency of evidence as long as the evidence is otherwise admissible. See for example, *In re Extradition of Cheung, 968 F. Supp. 791, 795 n.6 (D. Conn. 1997)* ("'The standard for admissibility of evidence in [an extradition] hearing is not left to judicial discretion,' and the court 'must accept as true all of the statements and offers of proof by the demanding state,' even if they contain hearsay.") (quoting *In re Marzook, 924 F. Supp. at 592)*. Likewise, the court in Oen Yin-Choy held that "authentication is the only requirement for admissibility of evidence under general United States extradition law." *858 F.2d at 1406*. Noting that there was no dispute that the evidence was properly authenticated in accordance with § 3190, the Oen Yin-Choy court found that the extraditee's "challenges to the reliability and competency of the evidence fail." Id. (citations omitted)(affirming the extradition judge's failure to consider over 180 objections to the competency of the government's evidence, including a challenge to the reliability and competency of the ten Chinese translations).

4. The Propriety of Challenges to the Reliability of Translated Statements

One of Ntakirutimana's arguments is that the Government's evidence is fundamentally unreliable because it is based on witness statements which have a high possibility of inaccuracy or bias. Specifically, he has concerns about the adequacy of the translators' interpretations during witness interviews and the fact that the translations are not independently verifiable since the statements were not recorded in the original

Kinyarwandan language. The case law indicates, however, that it is inappropriate for the Court to consider these objections. Courts have found that as long as the Government's documentary evidence is authenticated in accordance with § 3190, further consideration of the accuracy and reliability of the translation is inappropriate. For example, in Oen Yin-Choy, the court held that the extraditee's challenge to the reliability and competency of ten Chinese translations necessarily failed because "authentication is the only requirement for admissibility of evidence." *858 F.2d at 1406.* One court went so far as to hold that when addressing challenges to the accuracy of translations, "the translations must be presumed to be correct unless [the extraditee] presents some convincing evidence otherwise." *In re Extradition of David, 395 F. Supp. 803, 806 (E.D. Ill. 1975)* (the fact that one page of the translation contained fewer paragraphs than the original was not, in itself, sufficient to impeach the authenticity of the translation).

Likewise, in Tang Yee-Chun v. Immundi, the court rejected the extraditee's argument that the extradition judge should have excluded certain affidavits offered by the government because they allegedly were signed by witnesses who could not speak or read *English. 686 F. Supp. 1004, 1008-09 (S.D.N.Y. 1987)* (noting instead that the court "was bound by statute, *18 U.S.C. § 3190,* to accept these documents when they were duly authenticated"). Importantly, the Tang Yee-Chun court observed that "nothing in . . . the applicable statute requires the court to undertake an independent inquiry into the accuracy of any translations submitted with a formal request for extradition. Such a requirement would place an unbearable burden upon extradition courts and seriously impair the extradition process." *Id. at 1009.*

Finally, even if some courts appear willing to entertain challenges to the reliability of translations, these courts have shown a reluctance to make substantial inquiries. For example, although the In re Marzook court evaluated a translated witness statement for indicia of reliability, since the extraditee

had asserted that "the translations of statements, supposed confessions, and interviews were riddled with errors and [had to] be reconstructed," the court noted its reluctance to probe deeply when it stated that "the purpose of th[e extradition] hearing . . . was not to weigh the evidence in an attempt to determine the guilt of [the extraditee], but to determine whether the evidence supports a reasonable belief that [the extraditee] was guilty of the crimes charged." *924 F. Supp. at 592-93* (also noting that "the question of the weight or reliability of the evidence of the demanding country was not before [him] as an extradition magistrate," and that he "must accept as true all of the statements and offers of proof by the demanding state.").

D. Ntakirutimana is Extraditable Because the Government's Evidence Establishes Probable Cause to Sustain the Charges in the Tribunal's Indictments.

1. The Government's Evidence is Admissible.

As an initial matter, the Court must make clear that, without a doubt, the Government's evidence against Ntakirutimana is admissible and properly considered by this Court. Although Ntakirutimana objects to the declarations offered in evidence for a variety of reasons, those documents containing multiple hearsay and statements based upon unverified translations are fully admissible because they have been authenticated in accordance with *18 U.S.C. § 3190* and § 1342(a)(2) of Public Law No. 104-106. Therefore, although the Court may make determinations concerning the weight and sufficiency of the evidence, as discussed below, there is no question that the materials are properly before the Court.

2. Having Determined that the Government's Evidence is Admissible, the Court Must Consider the Weight and Sufficiency of the Evidence in Making a Probable Cause Determination.

The Court has struggled to reconcile the case law

concerning whether and how a court should consider extraditees' challenges to the credibility and reliability of the Government's evidence. The Court does not agree with those courts that have refused to consider the credibility challenges merely because the evidence is admissible under § 3190; after all, evidence may be admissible but not of sufficient weight to establish probable cause. Rather, the Court believes that it must take its cue from the Fifth Circuit which has indicated that extradition judges should consider the weight and sufficiency of the evidence offered to establish probable cause.

It is also clear, however, that the court's consideration of these matters must be made in a manner consistent with the limited nature of the extradition proceeding. The law is uniformly clear that this proceeding should not evolve into a full-blown trial because of a probing inquiry into the reliability of the Government's evidence. Therefore, Ntakirutimana's objections to the credibility of the witnesses and interpreters and to the reliability of the resulting witness statements and summaries thereof must be considered in this light.

3. The Government's Evidence is Sufficient to Establish Probable Cause.

The Court finds that the Government's evidence is sufficient to establish probable cause because (1) the witnesses' statements, as summarized by Mostert, are sufficient to establish probable cause that Ntakirutimana planned, participated in and directed the massacre of Tutsis in both the Mugonero Complex and the Bisesero region of the Kibuye Prefecture; (2) Ntakirutimana's challenges to this evidence are largely inappropriate because they clearly represent an attempt to contradict the Government's offer of proof; and (3) even if the Court considers Ntakirutimana's challenges, the Court, nevertheless, finds the evidence reliable.

a. The Witnesses's Statements, As Summarized by Mostert, Are Sufficient To Establish Probable Cause.

The Government has provided Officer Mostert's affidavit showing that several witnesses told him of Ntakirutimana's involvement in the massacre of Tutsis in Rwanda. Most significantly, three ordinary civilians (Witnesses H, I, and L) have given eye-witness accounts of Ntakirutimana killing and/or ordering the killing of Tutsis. Witnesses C and H also gave accounts of Ntakirutimana furthering the destruction of the Tutsis who were in hiding by removing a roof of a church with the purpose of preventing Tutsis from taking refuge there. This is direct evidence in support of the charges listed in the indictments.

Other witnesses have provided information corroborating these accounts. For example, although they have not stated that they actually saw Ntakirutimana shooting or otherwise attacking Tutsis in the Mugonero Complex, Witnesses B, F, K, and J did confirm that he was present during the attack and, according to Witness B, that he was in the company of the attackers. Witnesses H and I confirm that he arrived at the Mugonero Complex in the company of the attacking group. Witness H even stated that he was leading the attacking group. Likewise, although Witnesses C, D, and H, who were hiding in the Bisesero region, did not see Ntakirutimana actually killing Tutsis in the Bisesero region, they did observe Ntakirutimana transporting, feeding, and assisting soldiers and other armed civilians in their endeavor to locate and kill Tutsis hiding in the Bisesero region.

Importantly, the statements of other witnesses indicate not only that Ntakirutimana took part in the massacres as they were occurring, but also that Ntakirutimana had taken part in the planning of the attacks. For example, Witnesses A and B observed Ntakirutimana meeting frequently with other co-indictees (also identified as taking part in the attacks) shortly before the Mugonero attack began. Moreover, Witnesses A, B, C, and E actually heard Ntakirutimana instructing Tutsis to take refuge in the complex where he was later observed to be taking part in the massacre.

This evidence is clearly sufficient to establish probable cause. Of course, that is assuming that the evidence is sufficiently reliable. Therefore, the Court must now turn to Ntakirutimana's objections and the Court's resolution of his reliability and credibility challenges.

b. Ntakirutimana's Objections to the Government's Evidence Are Properly Excluded Because They Are Merely Attempts to Contradict the Government's Offers of Proof.

Although the Court does not pretend to fully comprehend what is meant by the unartful "contradictory" versus "explanatory" distinction found so often in the case law, in this case it is quite clear that Ntakirutimana's challenges are purely contradictory and properly excluded. Ntakirutimana has never offered evidence to explain the Government's proof; nor has he offered evidence that blatantly negates the Government's proof. What he has done is simply raise a litany of questions and speculations concerning the investigators, the interviewing techniques, the potential involvement of the Rwandan government in locating and "getting to" the witnesses, the potential problems raised by language barriers and the fact that there is no evidence that the translators used were somehow "certified" as accurate and unbiased, the potential unreliability of witnesses biased by tremendous suffering, and the fact that the witnesses' identities and actual statements have not been made known to the Court. These are not attempts to "explain" the Government's evidence that Ntakirutimana was at the scene of the massacres and took part therein. Nor are they attempts to explain the accounts of him keeping company with and assisting armed attackers.

Instead, what Ntakirutimana is attempting to do is to raise doubts about the credibility of the evidence by speculating about all the ways in which the evidence might be unreliable. In other words, these are questions for cross-examination. The cases are absolutely clear that cross-examination of witnesses is not allowed in extradition proceedings. Rather, the court is free to consider favorably summaries of hearsay statements so

that the requesting country is not forced to produce the declarants in a trial-like setting. Since such attempts at cross-examination are inappropriate when there are live witnesses, surely they cannot be countenanced when they are raised merely as speculations in a written brief. Although Ntakirutimana raises questions concerning reliability and credibility, he provides no evidence of unreliability or incredibility. It would be inconsistent with extradition law to demand that a requesting country, or international tribunal, respond to all of these questions in the United States. Rather, absent specific evidence that so undermines the Government's offers of proof that it negates probable cause, the Court believes that Ntakirutimana must raise his questions and speculations at trial before the Tribunal.

c. The Government's Evidence Has Indicia of Reliability Sufficient to Support a Finding of Probable Cause.

Nevertheless, although the Court believes that Ntakirutimana has raised only cross-examination-type challenges that are inappropriate for consideration during this proceeding, as explained above, the Court believes that it has an independent duty to consider the weight and sufficiency of admissible evidence in determining whether there is probable cause. Having done this, keeping in mind the specific concerns raised by Ntakirutimana and the concerns raised by Magistrate Notzon in the earlier proceeding, the Court believes that the Government's evidence, as presented in its second request for surrender, is sufficiently reliable to warrant a finding of probable cause. After all, the witnesses statements enjoy several indicia of reliability. First, the possible translation problems do not appear as serious as Ntakirutimana argues since Mostert routinely used the same interpreters and found that his attempts to converse through the interpreters were successful. In particular, he was able to personally observe the interpreters' performances during his interviews of Witnesses A, C, H, and L. Another indicia of reliability is the fact that the witnesses' statements about the events at Mugonero and Bisesero are so similar. In fact, one of the similar statements

was given by Witness B, whose interview was conducted in French without an interpreter.

Moreover, Mostert's investigation and discussions with other witnesses provide additional corroboration of the key witnesses' statements concerning the attacks and Ntakirutimana's participation therein. Although must of this corroboration did not directly implicate Ntakirutimana, corroboration of a witness's testimony can be made with respect to aspects of the story that are not in themselves inculpatory of the accused. See *United States v. Blount, 123 F.3d 831, 836 (5th Cir. 1997)* (finding that where an informant's tip is corroborated by the officers' investigation, probable cause was established even if the officers did not observe any illegal conduct), cert. denied, *Johnson v. United States, 522 U.S. 1097, 118 S. Ct. 895, 139 L. Ed. 2d 881 (1998)* and cert. denied, *Blount v. United States, 522 U.S. 1138, 118 S. Ct. 1101, 140 L. Ed. 2d 155 (1998).*

Finally, although Ntakirutimana argues that the witnesses are surely biased by their personal experiences in Rwanda, the Court is unwilling to engage in stringent credibility determinations since the witnesses are not here to speak for themselves and since there is no evidence that they are lying. The Fifth Circuit has held that "absent specific reasons for police to doubt his or her truthfulness, an ordinary citizen, who provides information to police at a crime scene or during an ongoing investigation, may be presumed credible without subsequent corroboration." *Blount, 123 F.3d at 835* (explaining that the "totality of the circumstances" standard for finding probable cause did not impose a requirement of corroboration in all cases); see also *United States v. Fooladi, 703 F.2d 180, 183 (5th Cir. 1983)* ("When an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.").

In sum, Ntakirutimana's remaining credibility concerns, while

they may very well establish reasonable doubt at trial, are not so serious as to render the evidence fundamentally unreliable for purposes of a probable cause assessment. Rather, the Court believes that the Government's evidence enjoys many indicia of reliability. Since Ntakirutimana clearly has not "obliterated" or otherwise seriously negated the Government's evidence, Ntakirutimana's speculations and questions concerning credibility must wait until the witnesses can be cross-examined at trial.

IV. NEITHER THE QUESTION OF WHETHER THE TRIBUNAL IS PROPERLY AUTHORIZED BY THE UNITED NATIONS CHARTER NOR THE ISSUE OF WHAT TREATMENT AND PROCEEDINGS AWAIT NTAKIRUTIMANA IS PROPERLY A SUBJECT FOR CONSIDERATION BY THIS COURT.

Ntakirutimana's final argument is that he cannot be surrendered to the Tribunal because the creation of the Tribunal violated the United Nations Charter. He believes that "[a] tribunal of criminal justice created by the Security Council is completely foreign to the powers and words of the U.N. Charter and any possible elasticity they might be imagined to have." Additionally, Ntakirutimana urges that the Tribunal cannot and will not "provide a fair trial, assure rights to counsel, or be able to compel the presence of witnesses for the defense."

Clearly, these issues are not appropriate inquiries for this Court. With respect to Ntakirutimana's allegation that the Tribunal was not authorized in accordance with the U.N. Charter, the Court will not engage in this inquiry any more than it would engage in an inquiry of whether a foreign sovereign's courts were properly authorized under its own constitution. See *Terlinden, 184 U.S. at 289* ("It would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized

to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.").

Moreover, the issue of the Tribunal's authorization has already been considered and favorably resolved with respect to the International Criminal Tribunal for the Former Yugoslavia by the Appeals Chamber of that Tribunal (which, under the Statute for the Rwanda Tribunal, also has jurisdiction over appeals from the Trial Chambers of the Rwanda Tribunal). See Prosecutor v. Tadic, Case No. IT-94-1-AR72, at 16-24 (Oct. 2, 1995) (holding that the Security Council did have authority to create an ad hoc tribunal to prosecute persons accused of genocide, war crimes and crimes against humanity).

Furthermore, with regard to Ntakirutimana's claim that he will be subjected to unfair processes before the Tribunal, it is well-settled that a fugitive cannot defeat extradition on the ground that procedures in the requesting state might fall short of the processes he would expect in the United States. Rather, federal courts have traditionally "refused to consider questions relating to the procedures or treatment that might await an individual on extradition." *In re Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989)*, cert. denied, *494 U.S. 1017, 108 L. Ed. 2d 496, 110 S. Ct. 1321*, see also *Escobedo, 623 F.2d at 1107*. Instead, "courts have chosen to defer these questions to the executive branch because of its exclusive power to conduct foreign affairs." *In re Extradition of Manzi, 888 F.2d at 206*. Finally, "courts have applied this rule where an individual facing extradition has questioned a foreign country's ability to provide adequate safety and protection." Id.; see also *Escobedo, 623 F.2d at 1107* ("The degree of risk to [an extraditee's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch"); *Garcia-Guillern, 450 F.2d at 1192* (the court is not "permitted to inquire into the procedure which awaits the [extraditee] upon his return").

CONCLUSION

Having considered the many arguments and issues raised by this request for surrender, the Court finds (1) that the matter was properly before the Court as a second request for surrender; (2) that the Surrender Agreement and § 1342 of Public Law No. 104-106 are, together, a constitutional basis for Ntakirutimana's surrender; (3) that there is probable cause to sustain the charges in both indictments; and (4) that Ntakirutimana's concerns about the Tribunal's authority under the United Nations Charter and its alleged inadequacies do not present any obstacles to this Court's finding of extraditability.

Therefore, the Court hereby certifies to the Secretary of State that Ntakirutimana may properly be surrendered to the Tribunal for Rwanda. It is ORDERED that Ntakirutimana be arrested and detained within this judicial district while awaiting his surrender to the proper authorities. Any transfer of Ntakirutimana, however, should be abated for thirty days in order to provide Ntakirutimana's counsel an opportunity to file any habeas petition.

So ORDERED.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 5th day of August, 1998.

JOHN D. RAINEY

UNITED STATES DISTRICT JUDGE

APPENDIX

SUMMARIES OF WITNESS STATEMENTS

Witness A

Witness A, a gardener who lived in the area near the Mugonero Complex, stated that he had known Ntakirutimana and his son Dr. Gerard Ntakirutimana[9] (a co-indictee presently in the custody of the Tribunal) for many years. He identified Elizaphan Ntakirutimana as the Pastor-President of the Seventh Day Adventist Church and as the leader of the Seventh Day Adventist Church in the Cyangugu and Kibuye Prefectures. Witness A also gave a physical description of Ntakirutimana and positively identified a photograph of Ntakirutimana. Witness A stated that he saw Ntakirutimana, Gerard Ntakirutimana and others meeting frequently immediately after the death of President Habyarimana had been reported and shortly before the attack at the Mugonero Complex. He specifically identified one of those individuals as Obed Ruzindana (a local businessman and co-defendant in the Mugonero Indictment). Moreover, he stated that he heard Ntakirutimana instructing Tutsis who resided in the area to seek refuge at the Mugonero Complex.

According to Mostert's declaration, once the Tutsis were gathered in the Complex, they were fearful that they would be slaughtered and so they attempted to communicate with local leaders for protection. Specifically, Witness A was aware of a letter written to Ntakirutimana by a Tutsi pastor who asked

---

[9] Unless otherwise indicated, all references in this appendix to "Ntakirutimana" are in reference to Elizaphan Ntakirutimana, the extraditee, not to his son Gerard.

for help on behalf of those seeking refuge in the Complex. According to Witness A, Ntakirutimana responded negatively and said that he could not do anything to save the Tutsis. Finally, Witness A also stated that as a large number of people began to gather in the Mugonero Complex to seek refuge from reported violence spreading throughout the area, he heard Dr. Gerard Ntakirutimana refuse to provide medical treatment to wounded Tutsis immediately before the massacre.

Witness B

Witness B stated that he had known Ntakirutimana for many years and confirmed that he was an important leader in the community. He gave a physical description of Ntakirutimana (similar to that given by Witnesses A, C, H, and L) and positively identified a photograph of Ntakirutimana as the person he knew and as the one he observed before and during the Mugonero attack in the company of the co-defendants who carried out the attack. Like Witness A, Witness B stated that he saw Ntakirutimana frequently meeting with his son Gerard and others prior to the attack. And, like Witness A, he said that he heard Ntakirutimana instructing Tutsis who resided in the area to seek refuge at the Mugonero Complex.

Furthermore, Witness B stated that he was present during the Mugonero attack and observed Ntakirutimana as among those who carried out the attack.[10] Finally, although he did not state that he observed Ntakirutimana carrying out the attack himself, Mostert has stated that Witness B's general account of the massacre was confirmatory of the manner in which the massacre took place and was consistent with Witnesses H's and C's descriptions of the nature of the group

---

[10] He survived by hiding above the ceiling of one of the rooms in the hospital and then fled to the Bisesero region.

of attackers and the types of arms they used.

Witness C

Like Witnesses A and B, Witness C made a confirmatory identification of Ntakirutimana by identifying his photo, providing a physical description of Ntakirutimana similar to that described by Witnesses A, B, H, and L, and stating that he was familiar with Ntakirutimana prior to the attack as he saw him every day. Like Witnesses A and B, Witness C stated that he heard Ntakirutimana instructing Tutsis who resided in the area to seek refuge at the Mugonero Complex. Moreover, Witness C said that Ntakirutimana specifically told Witness C to go into the bushes and encourage the Tutsis hiding there to come to the Complex. At Ntakirutimana's direction, Witness C then brought approximately 50 people to the Complex.

Like Witnesses A, H, and I, Witness C also was aware of the letter written to Ntakirutimana by a Tutsi pastor who sought help on behalf of those seeking refuge in the Complex. Witness C heard Ntakirutimana's reply to the Tutsi Pastor: "You are condemned to die. You go and die, there is nothing I can do to save you."

Witness C said that he also observed the start of the April 16, 1994 attack at Mugonero. He observed a large group of civilians and soldiers, armed with machetes, spears, clubs and guns, arrive at the Complex and surround it. He observed the armed group attempt to enter the Complex, though they were stopped for a short time by stone throwing. Nevertheless, he stated that, with reinforcements, they eventually forced their way into the Complex and began shooting at the Tutsi group, although the Tutsis attempted unsuccessfully to fight the armed attackers for some time. During this period, Witness C saw other co-indictees (Gerard Ntakirutimana, Obed Ruzindana and Charles Sikubwabo) among the attackers of the Tutsis. Witness C stated that the Tutsis eventually retreated into the buildings of the Complex. Witness C was among those who ran into the surgery room of the hospital. He hid himself

under the bodies of those who had already been killed and remained there until 2:00 a.m. of the following day when he escaped through the darkness to the Bisesero region. He observed that many of the other survivors of the massacre also fled to this area.

Witness C stated that virtually every day for the several months he hid in the Bisesero region, he saw the cars of Ntakirutimana, Gerard Ntakirutimana and Obed Ruzindana transport attackers into the Bisesero region in the morning and out of that area at night. On one occasion, Witness C was hiding near a church in Murambi within the Bisesero area. He saw Ntakirutimana arrive with a group of soldiers and he heard Ntakirutimana tell them, "Let's take off the roof from this church so it cannot be used anymore as a hiding place for these dogs." Witness C then observed the soldiers destroy the roof of the church.

Witness D

Witness D was a Tutsi who, having survived a massacre similar to the one that took place at the Mugonero Complex, had fled to the Bisesero region where he remained from April until July of 1994. He stated that he saw Ntakirutimana, Obed Ruzindana and Charles Sikubwabo bringing armed groups into the Bisesero area almost every day. He also saw Ntakirutimana providing food and drinks to these armed groups and carrying a military-type firearm on almost all of these occasions. Mostert's declarations do not indicate how Witness D identified Ntakirutimana as the person transporting the armed groups or whether Witness D knew Ntakirutimana prior to the time when he was in hiding.[11]

---

[11] In Prosper's declaration, however, Prosper does state that all of the witnesses, A through L, know or are familiar with Ntakirutimana.

Witness E

Like Witnesses A, B and C, Witness E stated that he heard Ntakirutimana instructing Tutsis who resided in the area to seek refuge at the Mugonero Complex. Like Witness A (who stated that he remembered Ntakirutimana meeting with Gerard Ntakirutimana and others including another co-defendant in the indictment), Witness E observed Gerard Ntakirutimana meeting with Charles Sikubwabo (the mayor of Gishyita and a co-defendant in the Mugonero indictment).

Also like Witness A, Witness E stated that as a large number of people began to gather at the Complex, he heard Gerard Ntakirutimana refuse to provide medical treatment to Tutsis immediately before the massacre. Additionally, like Witness G, Witness E observed Gerard Ntakirutimana separate the Hutu patients from the Tutsi patients in the hospital; he also observed that the Hutu patients left the Complex.

Witness F

Although Mostert did not include a summary of Witness F's statement in his original declaration, in his supplemental declaration, he clarified that Witness F provided a general but less detailed description of the manner in which the Mugonero attack unfolded; Mostert has stated that the description is similar to the accounts of the other witnesses. Additionally, Witness F indicated that he saw Ntakirutimana's vehicle at the massacre at the time the massacre took place.

Witness G

Witness G is mentioned only once in the declaration. Like Witness E, he stated that he observed Gerard Ntakirutimana separate the Hutu patients from the Tutsi patients and that he observed that the Hutu patients left the Complex. Mostert's declaration does not indicate how Witness G identified Ntakirutimana or whether Witness G knew Ntakirutimana prior to the attack.

Witness H

Witness H provided a physical description of Ntakirutimana similar to that given by Witnesses A, B, C, and L, and positively identified a photograph as that of Ntakirutimana, a man he had known for many years. Additionally, he characterized his familiarity with Ntakirutimana by stating that he saw him every day.

Like Witnesses A, C, and I, Witness H was aware of a letter written to Ntakirutimana by a Tutsi pastor who was asking for help on behalf of the Tutsis who had gathered at the Mugonero Complex. Like Witnesses A, C, and I, he was also aware that Ntakirutimana's response to the letter had been negative; specifically, he heard Ntakirutimana say, "You all are condemned to die. It is all over for you." Witness H also stated that the same Tutsi pastor wrote again to Ntakirutimana the morning of April 16, 1994 (the day of the attack) renewing his plea for protection. Witness H then saw Ntakirutimana depart by car towards a neighboring town. Witness H stated that although he and others hoped that Ntakirutimana was going to seek help, they soon saw Ntakirutimana, Gerard Ntakirutimana and the other individuals accused in the Mugonero indictment arrive together in their cars at the Mugonero Complex followed by a large group of armed people. Witness H stated that Ntakirutimana's car led the group, which also included Obed Ruzindana and Charles Sikubwabo, the mayor, (in whose company other witnesses had observed Ntakirutimana prior to the attack). Witness H then observed a large group of civilians and soldiers, armed with machetes, spears, clubs and guns, arrive at the Complex and surround it.

Specifically, Witness H saw Ntakirutimana, Gerard Ntakirutimana, Obed Ruzindana and Charles Sikubwabo shooting at a group of Tutsis in the Complex. He also heard Ntakirutimana say to other attackers, "Kill them all." Witness H fled to the surgery room and hid under a pile of corpses. He remained in hiding until after midnight and then escaped to the

Bisesero region. He returned a few days later to determine if any children or surviving family members were alive; he found only naked corpses.

With respect to the activities in the Bisesero region, Witness H (like Witness C) identified Ntakirutimana as transporting attackers into the area to find hiding Tutsis. Like Witness C, he was hiding near the church as Ntakirutimana and Gerard Ntakirutimana, armed with guns, arrived at the church with others. Like Witness C, Witness H heard Ntakirutimana tell those with him to take the roof off of the church so the fleeing Tutsis could not use the church as a refuge.

Witness I

Witness I is the most controversial of the witnesses. Mostert has clarified that Witness I was interviewed three times. In October 1995, a Tribunal investigator took his statement regarding the events in Kibuye Prefecture during the time period in question. In a signed statement (recorded in English), Witness I stated that the leaders of the Mugonero massacre "were armed with rifles and were shooting like the others. Ntakirutimana, Elizaphan, the head of the Pastors was also there armed with a gun." In April 1996, he made another signed statement (taken by a different investigator and recorded in French). In this statement, he tells of observing Ntakirutimana with a gun at the Mugonero attack. He also spoke of seeing the vehicles of Ntakirutimana and his son bringing groups to attack Tutsi survivors in the Bisesero region. In May 1996, Witness I supplemented his statement confirming that Ntakirutimana had promoted the massacres, had a gun at the time of the Mugonero Massacre, and took part in the attacks. Specifically, he told of seeing Ntakirutimana shooting a gun as part of his participation in the Bisesero attacks. This third statement was unsigned because the investigator, after preparing a typewritten statement, did not return to have the statement signed.

Additionally, although it is not clear during which interview

Witness I related the following information, Witness I at some point did state that he knew Ntakirutimana both as a Hutu who was President of the Seventh Day Adventist Church and also as a neighbor. Additionally, he stated that (like Witnesses A, C, and H) he was aware of the Tutsi pastor's letter to Ntakirutimana seeking help for the Tutsis who had gathered at the Mugonero Complex. Witness I also stated that Ntakirutimana's response to the request was negative. Specifically, Witness I said that Ntakirutimana had stated that a response to the request for help would come by 9:00 a.m. the same day. In fact, this is when the massacres began.

Witness J

Witness J stated that after the beginning of unrest on April 6, 1994, Ntakirutimana was joined at the Mugonero Complex by his son, Gerard Ntakirutimana, who had evacuated his own home and sent his family to another area. Mostert's declarations do not indicate that Witness J knew any other information concerning Ntakirutimana's participation in the Mugonero attack.

Witness K

Although Mostert did not include a summary of Witness K's statement in the original declaration, in his supplemental declaration, he clarified that Witness K provided a general but less detailed description of the manner in which the Mugonero attack unfolded; Mostert also stated that the description was similar to the accounts of the other witnesses. Additionally, Witness K indicated that on the day of the massacre, Ntakirutimana's vehicle served to transport some of the armed attackers.

Witness L

Witness L was a roadworker living in the Bisesero region. Like Witnesses A, B, C, and H, Witness L indicated that he knew Ntakirutimana well and provided a physical description

of Ntakirutimana (similar to that given by Witnesses A, B, C, and H) before making a photograph identification of Ntakirutimana as the person whom Witness L observed participating in the Bisesero attacks. In fact, prior to April 1994, Witness L had attended Ntakirutimana's Mugonero church on a regular basis. Soon after hearing news of the President's plane crash, the event precipitating the subsequent massacres in Rwanda, Witness L and six family members fled to the hills and bushes of Bisesero, where Witness L remained for three months. Witness L told of seeing armed groups enter the Bisesero area every day armed with guns, machetes, lances, clubs and stones. Witness L saw Ntakirutimana in his white Toyota pickup truck on at least four occasions searching for Tutsis hiding from attacks. On every occasion, the truck was filled with armed civilians and, on one occasion, the truck was filled with armed soldiers. Witness L stated that Ntakirutimana led the group of soldiers, who followed his orders. On each occasion, Witness L saw Ntakirutimana locate hiding Tutsis, point out their location to the attackers and then instruct the attackers to kill them.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION

IN THE MATTER OF SURRENDER OF ELIZAPHAN NTAKIRUTIMANA.

MISC. NO. L-96-5

988 F. Supp. 1038; 1997 U.S. Dist. LEXIS 20714

December 17, 1997, Entered

DISPOSITION: Government's request that ELIZAPHAN NTAKIRUTIMANA be surrendered to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide or Other Such Violations Committed in the Territory of Neighboring States DENIED.

COUNSEL: For U.S.A., plaintiff: Donald DeGabrielle, US Attorneys Office, Houston, TX.

For ELIZAPHAN NTAKIRUTIMANA, defendant: Lazaro Garza-Gongora, Jr, Garza-Gongora & Gutierrez, Laredo, TX.

For ELIZAPHAN NTAKIRUTIMANA, defendant: Ramsey Clark, Lawrence (Larry) W Schilling, Attorney at Law, New York, NY.

JUDGES: MARCEL C. NOTZON, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: MARCEL C. NOTZON

OPINION: MEMORANDUM AND ORDER

Pending before the Court is a request by the United States (the Government) for this Court to authorize the surrender of ELIZAPHAN NTAKIRUTIMANA (the Extraditee) to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide or Other Such Violations Committed in the Territory of Neighboring States (the Tribunal). For the reasons stated below, the Court DENIES this request and ORDERS the immediate release of the Extraditee.

FACTUAL BACKGROUND

The Extraditee is a 73 year old Rwandan citizen currently detained at the Webb County Law Enforcement Center. At the time of the events which form the basis of the charges against him, he was the President of the Seventh Day Adventist Church in Rwanda and was based in a church complex in Mugonero, Gishyita Commune, Kibuye Prefecture, Rwanda.[1] He is charged with luring several ethnic Tutsis to his church complex in the days immediately following the death of Rwandan President Habyarimana on April 6, 1994, and then organizing and leading an attack on his church complex on April 16, 1994, to kill all of these Tutsis. The Extraditee is an ethnic Hutu.[2] After the April 16, 1994 attack, the Extraditee

---

[1] A Prefecture is roughly equivalent to a State within the United States, and a Commune is roughly equivalent to a county within a state.

[2] For many hundreds of years there has been ethnic fighting between Tutsis and Hutus in Rwanda. The Hutus are the ethnic majority in Rwanda and comprised 84% of the population in 1994. At that time Tutsis comprised 14% of the population of Rwanda. Historically, Tutsis have held

is accused of leading armed bands of men into the countryside of the Bisesero region of Rwanda in an effort to hunt down and kill those Tutsis who survived the attack at Mugonero.[3] At some point after the attack on the Mugonero compound, the Extraditee was admitted to the United States and was legally residing with his son in Laredo, Texas, when he was arrested pursuant to these proceedings.[4]

On September 26, 1996, the Extraditee was provisionally arrested on the above charges. The Government timely submitted the packet containing the charges against the Extraditee, the official request for surrender from the tribunal and the documents intended to support that request on October 18, 1996. The instant request for surrender was made in the Government's "Motion for Hearing on Request for the Surrender of Elizaphan Ntakirutimana," filed on January 9, 1997 (Docket No. 19).

Since the filing of the request, the parties have submitted copious filings in this matter both on their own initiative and in response to directives from the Court. The Court has

---

disproportionate levels of wealth and political power in Rwanda dating back to British Imperialist days and beyond.

[3] The Bisesero region is a mountainous region of Rwanda that spans two communes.

[4] The record is unclear as to when the Extraditee arrived in the United States. The Government contends that he remained in Rwanda in the months following the Mugonero attack and led the attacks in the Bisesero region. The Extraditee contends that he fled the Mugonero compound on the morning of April 16, 1994, and did not return to the area. What is undisputed is that at some point the Extraditee was admitted to the United States and was residing here legally when he was arrested

reviewed all of these filings, as well as all amicus curiae, prior to issuing this Memorandum and Order.

DISCUSSION

In matters of extradition, the Court must determine 1) whether the Court has jurisdiction to determine whether the fugitive is subject to surrender, and whether the Court has proper jurisdiction over the fugitive, 2) whether the fugitive is being sought for offenses which the applicable agreement permits surrender, and 3) whether there is sufficient evidence to establish the fugitive has committed the offenses for which he is being charged. See *Bingham v. Bradley, 241 U.S. 511, 516-517, 60 L. Ed. 1136, 36 S. Ct. 634 (1916); McNamara v. Henkel, 226 U.S. 520, 523, 57 L. Ed. 330, 33 S. Ct. 146 (1913); Ornelas v. Ruiz, 161 U.S. 502, 508-509, 40 L. Ed. 787, 16 S. Ct. 689 (1896); Austin v. Healey, 5 F.3d 598, 600-01 (2nd Cir. 1993),* cert. denied, *510 U.S. 1165, 114 S. Ct. 1192, 127 L. Ed. 2d 542 (1994); Garcia-Guillern v. United States, 450 F.2d 1189, 1191* (5th Cir., 1971), cert. denied, *405 U.S. 989 (1972); Sayne v. Shipley, 418 F.2d 679, 683-84* (5th Cir., 1969), cert. denied, *398 U.S. 903, 26 L. Ed. 2d 61, 90 S. Ct. 1688 (1970); Zanazanian v. United States, 729 F.2d 624, 625-626* (9th Cir., 1984). As will be shown below, the instant request fails on the first and third prongs of the above inquiry.

Jurisdiction:

The Government seeks the surrender of the Extraditee pursuant to the "Agreement on Surrender of Persons between the Government of the United States and the Tribunal" (Agreement) signed January 24, 1995, and the provisions of Section 1342 of Public Law 104-106. This section makes applicable to the instant case the procedures applicable to international extradition pursuant to *18 U.S.C. § 3184* et seq., and the interpretative case law pertaining to those procedures. Accordingly, Congress has instructed the Court to treat the Agreement as if it were a treaty of extradition negotiated between the United States and some other sovereign country.

After much careful consideration, the Court is of the opinion that Congress cannot so instruct the Court and that Public Law 104-106, as it pertains to the Tribunal[5], is unconstitutional. Accordingly, the Court has no jurisdiction to hear the Government's requests and it will be DISMISSED.

On August 28, 1997, the Court invited the parties to comment on the authority of the Executive to negotiate treaties with parts of a multi-national body like the Tribunal and Congress' ability to effectuate such a treaty by enacting enabling legislation rather than adhering to a traditional ratification process by the Senate.

The Government cites the Court to four cases dealing with the United States-United Nations (U.N.) Headquarters Agreement for the proposition that the Executive has unlimited ability to make treaties and that courts have given effect to those agreements. See *Concerned Jewish Youth v. McGuire, 621 F.2d 471* (2nd Cir., 1980), cert. denied, *450 U.S. 913, 67 L. Ed. 2d 337, 101 S. Ct. 1352 (1981); United States v. Palestine Liberation Organization, et al., 695 F. Supp. 1456* (S.D.N.Y., 1988); *International Society for Krishna Consciousness, Inc. v. New York, 501 F. Supp. 684* (S.D.N.Y., 1980); *Greenberg v. Murphy, 329 F. Supp. 37* (S.D.N.Y., 1971). While these cases support, silently, the Executive power to make international agreements, none of these cases addressed whether the Headquarters Agreement itself is constitutional. Rather they were all concerned with regulating other activities tangentially related to the Headquarters Agreement.

McGuire and International Society for Krishna Consciousness, deal with restrictions on First Amendment

---

[5] This same law authorized the surrender of persons to a similar U.N. tribunal investigating charges of genocide in the former Yugoslavia. The Court expresses no opinion on the Constitutional efficacy of those provisions.

activity around the U.N. Both found the minor restrictions on First Amendment rights immediately around the U.N. were justified by the need for the United States to uphold international agreements. They did not pass on whether the Headquarters agreement was properly enacted. Additionally, United States v. Palestine Liberation Organization, et al., which decided whether the Anti-Terrorism Act of 1988 authorized the closing of the PLO mission to the U.N., recognizes that there is a difference between treaties and other international agreements. However that difference was not important to the decision of the court and was not addressed. *United States v. Palestine Liberation Organization, et al., 695 F. Supp. at 1458, n.3* ("We refer to the Headquarters Agreement as a treaty, since we are not concerned here with making a distinction among different forms of international agreement. The applicable law implicates all forms, including the Headquarters Agreement.").

Moreover, the Headquarters agreement was enacted pursuant to a treaty ratified with Senatorial advise and consent. The preamble to the agreement states, ""Whereas the Charter of the United Nations was signed on behalf of the United States on June 26, 1945, and was ratified on August 8, 1945, by the President of the United States, by and with the advice and consent of the Senate, and the instrument of ratification of the said Charter was deposited on August 8, 1945." Joint Res. Aug. 4, 1947, c. 482, 61 Stat. 756 (emphasis added). Clearly, the Headquarters Agreement was made to effectuate a validly negotiated, signed and ratified treaty entered into by the United States. This places it in marked contrast to the Agreement with the Tribunal in the instant case.

While the cases cited by the Government tacitly support the assertion that the Executive may have unlimited ability to make international agreements, these cases have no bearing on how Executive agreements are constitutionally implemented. Thus they are of little value in the instant context.

Of more value is the justification given by the Government for Congressional enactment. The Government cites the Court to *Grin v. Shine, 187 U.S. 181, 191, 47 L. Ed. 130, 23 S. Ct. 98 (1902)* for the proposition that Congress may provide for the extradition of fugitives without treaty and without Executive action. The Court can find no support for this contention in the text of that case. Indeed Grin v. Shine involved an extradition of a fugitive to Russia, a country with which the United States had a valid extradition treaty. The wording seized upon by the Government ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient." *Grin v. Shine, 187 U.S. at 191.)* pertains to the question of whether Congress could require more or less stringent proofs for surrendering a fugitive than those expressly contained in the treaty between Russia and the United States. It was not a statement by the Court that Congress can make extradition policy of its own accord. Indeed the entire res of the Shine case dealt with the application of provisions of a valid treaty between the United States and Russia. For the Government to claim that this case supports Congressional action in the field of extradition without a valid treaty is inapposite at best.

The Government also refers the Court to the provisions of *18 U.S.C. 3181*(b) (1996) for the proposition that fugitives may be extradited without treaty. Section 3181(b) allows, "the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies," certain specific facts. *18 U.S.C. 3181*(b). However, despite this broad language, every case construing this section has required that a valid treaty exists between the United States and the country seeking extradition. See *Ivancevic v. Artukovic, 211 F.2d 565* (9th Cir, 1954), cert. denied *75 S. Ct. 28, 348 U.S. 818, 99 L. Ed. 645*, reh'g. denied

75 S. Ct. 202, 348 U.S. 889, 99 L. Ed. 698.(Extradition from the United States to a foreign country may be accomplished only during existence of any treaty of extradition with such foreign government.); *U.S. ex rel. Saroop v. Garcia, 36 V.I. 353, 109 F.3d 165* (3rd Cir., 1997)(extradition treaty existed based on conduct between Trinidad and Tobago and the United States); *Kin-Hong v. United States, 926 F. Supp. 1180 (D.Mass 1996)*, supp. *927 F. Supp. 517*, reversed on other grounds, *83 F.3d 523* (3rd Cir., 1996)(Hong Kong's reversion to People's Republic of China (PRC) on July 1, 1997, will extinguish United States' authority to extradite individuals to Hong Kong). It is clear from these cases that, contrary to the Governments position, Congress has no independent authority to regulate extradition and that a treaty of extradition is required before extradition can occur.

For his part, the Extraditee claims, without citation, that there has never been an extradition from the United States that was not based on a treaty. While the Extraditee has not cited any authority for this assertion, the Court has found no instance where an extradition has occurred without a treaty. In none of the cases cited by either side in this dispute has there been an occasion where a fugitive was extradited absent a valid treaty. This fact convinces the Court that this is more than a mere matter of statistics.

The Constitution calls for the Executive to make treaties with the advise and consent of the Senate. Throughout the history of this Republic, every extradition from the United States has been accomplished under the terms of a valid treaty of extradition. In the instant case, it is undisputed that no treaty exists between the United States and the Tribunal. This is so even when, the Government insists, and the Court agrees, the Executive has the full ability and right to negotiate such a treaty. The absence of a treaty is a fatal defect in the Government's request that the Extraditee be surrendered. Without a treaty, this Court has no jurisdiction to act, and Congress' attempt to effectuate the Agreement in the absence of a treaty is an unconstitutional exercise of power.

Accordingly, the Court FINDS that the provisions of Section 1342 of Public Law 104-106 are unconstitutional as they are applied to the Tribunal, and the Court DISMISSES the Government's request.

Probable Cause:

Assuming arguendo that Section 1342 of Public Law 104-106 is constitutional, the Court will proceed to an examination of whether there is probable cause to support the extradition of the Extraditee. The Court recognizes that the crimes of which the Extraditee is accused are crimes that are enumerated in the Agreement as supporting surrender. Thus the second prong of the Court's inquiry would be satisfied. The same cannot be said for the third prong.

The standard to be utilized in determining whether a fugitive is to be surrendered on the strength of the documents submitted by the requesting body is that of probable cause. *Escobedo v. United States, 623 F.2d 1098, 1102* (5th Cir.), cert. denied, *449 U.S. 1036, 66 L. Ed. 2d 497, 101 S. Ct. 612*, reh'g. denied, *451 U.S. 934 (1980); Garcia-Guillen v. United States, 450 F.2d at 1192; Jimenez v. Aristeguieta, 311 F.2d 547, 562* (5th Cir., 1962). In making this determination, the Court is free to exercise its discretion in judging the credibility of the evidence presented as in any other domestic case where the Court would be required to make a determination of probable cause. *Parretti v. United States, 112 F.3d 1363* (9th Cir., 1997). However, the Court is not allowed to hear live testimony from witnesses, allow discovery, or to consider evidence submitted by the fugitive that would contradict the evidence presented by the Government. See e.g., *Hooker v. Klein, 573 F.2d 1360* (9th Cir.), cert. denied, *409 U.S. 869; Collins v. Loisel, 259 U.S. 309 at 316, 66 L. Ed. 956, 42 S. Ct. 469; Jimenez v. Aristeguieta, 311 F.2d at 556.* Following these principles, the Court FINDS that the Government has not carried its burden.

The support for the charges against the Extraditee comes

from an affidavit filed by a Belgian police officer assigned to the Tribunal, ARJEN MOSTERT. Officer Mostert has provided a 25 page affidavit which lays out the evidence against the Extraditee. The first eleven pages of his affidavit set out the history behind the creation of the Tribunal and recount, in a general way, the events that happened after the death of President Habyarimana in April of 1994.

When Officer Mostert finally begins his review of the attacks in which the Extraditee has been charged he offers a brief paragraph stating that the witnesses have not been offered any monetary reimbursement or other consideration for their testimony. None of the witnesses are identified, other than by a letter (i.e. A, B, C, etc.), and there is no other identifying information other than a general description that all witnesses are "ordinary civilians."

Officer Mostert states that twelve survivors of the attacks on Mugonero and Bisesero were interviewed, witnesses lettered A-L. There is no statement that these witnesses have given reliable information in the past, or that Officer Mostert in his experience finds them to be reliable. Officer Mostert admits that he did not interview all, or even a majority, of the witnesses, and that their testimony is, at times, taken from reports of other officers which he reviewed. There is no indication that either Officer Mostert, or the other officers who conducted the interviews, were fluent in Kinyarwanda, the language of Rwanda. There is also no indication that the witnesses were fluent in any language spoken by the interviewers.

Officer Mostert does not state when these interviews were conducted in relation to the attacks. It is clear that at least one witness (Witness I) was interviewed on multiple occasions. It is not clear under what circumstances these interviews were conducted. Additionally, the affidavit fails to state when the charges against the Extraditee were first lodged (i.e. whether they were immediately lodged or whether they emerged over a period of time). Finally, there is not even any indication that

these witnesses were placed under oath prior to making their statements.

Officer Mostert claims that four of the twelve witnesses (witnesse A, B, C and H) identified a picture of the Extraditee as a person who "participated in the attack." However, the affidavit fails to state when and under what conditions this photograph was shown to the witnesses, or whether the photograph was shown in conjunction with other photographs.

All of the above factors convince the Court that the possibility for inaccuracy or incredibility in the witnesses' statements is high. For that reason, the specific allegations against the Extraditee will be examined in light of the above factors.

Of the twelve witnesses only two claim that they observed the Extraditee during the attacks. All of the pertinent testimony will be discussed below. The Court will begin with the Mugonero attack.

Witness H states that he saw the Extraditee in the days immediately before the attack meeting with some of those who carried the attack out. He then states that once the attack began he saw the Extraditee, along with three others, armed with guns shoot at a group of Tutsis and that some of these Tutsis died. See Affidavit of Arjen Mostert at P. 18-19 P38. Taking this statement as true, the Court notes that Witness H does not state how he knew the group into which the Extraditee shot was composed of Tutsis. He does not state whether the group was armed nor does he state where in the complex this shooting took place. He does not say how long after the conflict began, which lasted all day, this shooting took place. This one sentence statement by Witness H is the only reference in the 25 pages of the affidavit wherein the Extraditee is accused of actually taking part in the attack at the Mugonero complex. None of the other witnesses can say that the Extraditee participated in the attack during that day. The most any other witness says is Witness I's statement that the

Extraditee was "among the attackers." See Affidavit of Arjen Mostert at p. 20 P40.

There is no mention by any witness that the Extraditee committed a specific act, killed a friend or loved one, instructed others to kill or injure a friend or loved one, directed the assault or participated in any way other than the vague reference that he was "among the attackers." When examined in light of the factors mentioned above, such evidence is insufficient to convince the Court that probable cause exists to believe that the Extraditee participated in the attack on the Mugonero complex.

The same result is reached regarding the Government's allegations regarding the Bisesero attacks. Only Witness I claims to have seen the Extraditee kill or direct the killing of anyone in the Bisesero region. Witness I claims that he saw the Extraditee shooting at civilian Tutsis. See Affidavit of Arjen Mostert Witness I does not make this claim until what is apparently his third interview on the matter. Id.. In an earlier interview, Witness I merely claimed, once again, that the Extraditee was "among the attackers" in the Bisesero region. Id..

Witnesses C and H claim they saw the Extraditee instruct other armed Hutus to take the roof off of a church so that it could not be used as a shelter. However, such an action would not constitute genocide as charged in the indictment.[6]

---

[6] Genocide is defined by the Tribunal in U.N. security counsel Resolution 955, Article 2, Paragraph 2 as:

"any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

Once again, the affidavit cannot support the conclusion that the Extraditee participated in the Bisesero attacks. It is remarkable more for what it does not say than what it does say. The only allegation of attacks comes from one witness who did not remember until his third interview that the Extraditee had participated in attacks. When this witness did remember that fact, he provided no detail as to where these attacks occurred and who, if anybody, was killed. Additionally, he gave no specifics as to the time these shootings occurred. As with the rest of Officer Mostert's affidavit, Witness I spoke in generalities and gave no specific facts that would support the surrender of the Extraditee.

After careful consideration of the affidavit submitted by the Government, the Court FINDS that the information contained therein does not rise to the level of probable cause. Accordingly, the Government's request for surrender is

---

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

The only conceivably applicable section to the allegation that the Extraditee ordered that a roof be taken off of a church is (c). The Court cannot say in good conscience that, assuming as the Court must that the event occurred, taking the roof off of one church is inflicting conditions on the Tutsis calculated to bring about their physical destruction.

DENIED.

CONCLUSION

In light of the findings made above, it is hereby ORDERED that the Government's request that ELIZAPHAN NTAKIRUTIMANA be surrendered to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide or Other Such Violations Committed in the Territory of Neighboring States is DENIED. Additionally, the U.S. Marshal's Service is DIRECTED to, forthwith, release ELIZAPHAN NTAKIRUTIMANA from custody in accordance with the findings contained in this Memorandum and Order.

IT IS SO ORDERED.

DONE at Laredo, Texas, this 17th day of December 1997.

MARCEL C. NOTZON

UNITED STATES MAGISTRATE JUDGE

United Nations

S/RES/955 (1994)
8 November 1994

RESOLUTION 955 (1994)

Adopted by the Security Council at its 3453rd meeting, on 8 November 1994 *Security Council*, reaffirming all its previous resolutions on the situation in Rwanda, having *considered* the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and *having taken note* of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and *requests* States to keep the Secretary-General informed of such measures;

3. *Considers* that the Government of Rwanda should be

notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4. *Urges* States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5. *Requests* the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council;

6. *Decides* that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and *decides* that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. *Decides* to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. *Decides* to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and

other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment ;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

Article 4

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
(a) Violence to life, health and physical or mental well-being

of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
(h) Threats to commit any of the foregoing acts.

Article 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about

to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9

Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
(a) The act for which he or she was tried was characterized as an ordinary crime; or
(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10

Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:
(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;
(b) The Prosecutor; and
(c) A Registry.

Article 11

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:
(a) Three judges shall serve in each of the Trial Chambers;
(b) Five judges shall serve in the Appeals Chamber.

Article 12

Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.
2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.
3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
(a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality

and neither of whom shall be of the same nationality as any judge on the Appeals Chamber;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the six judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4. In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13

Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber

to which he or she was assigned.
3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14

Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four- year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and

understands.
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for

trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20

Rights of the accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the

International Tribunal for Rwanda;
(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order

the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24

Appellate proceedings

1. Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
(a) An error on a question of law invalidating the decision; or
(b) An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26

Enforcement of sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
(a) The identification and location of persons;
(b) The taking of testimony and the production of evidence;
(c) The service of documents;
(d) The arrest or detention of persons;
(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29

The status, privileges and immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor

and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30

Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.

Article 31

Working languages

The working languages of the International Tribunal shall be English and French.

Article 32

Annual report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

AGREEMENT ON SURRENDER OF PERSONS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR GENOCIDE AND OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF RWANDA AND RWANDAN CITIZENS RESPONSIBLE FOR GENOCIDE AND OTHER SUCH VIOLATIONS COMMITTED IN THE TERRITORY OF HEIGHBOURING STATES

The Government of the United States of America and the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as the "Tribunal"].

Recalling the obligation of the United States, pursuant to the Statute of the Tribunal adopted by United Nations security Council Resolution 955 of November 8, 1994 (hereinafter referred to as the "Statute"), to surrender accused or convicted persons to the Tribunal, and Desiring to facilitate the surrender of such persons.

Have agreed as follows:

Article 1. Obligation to Surrender

1. The United States agrees to surrender to the Tribunal, pursuant to the provisions of this Agreement and the Statute, persons, including United States citizens, found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal as defined in the Statute.

2. The requirements for a finding that a person is subject to surrender to the Tribunal are solely those specifically articulated in this Agreement. No additional conditions regarding or defenses to surrender may be asserted by the person sought as barring such person's surrender to the Tribunal under this Agreement.

Article 2. Procedures

1. The Tribunal shall submit requests for surrender to the Embassy of the United States in the Netherlands or the United States in another State in which the Tribunal may be situated.

2. Requests for surrender shall be supported by:

(a) documents, statements or other types of information which describe the identity and probable location of the person sought;

(b) information describing the essential facts and procedural history of the case,

(c) a description of the specific violation or violations referred to in the Statute for which surrender of the person is sought; and

(d) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.

3. A request for surrender of a person who is sought for, prosecution shall also be supported by copies of the warrant of arrest of the arrest and of the indictment information sufficient to establish there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested.

4. A request for surrender relating to a person who has been found guilty of the violation for which surrender is

sought shall also be supported by

(a) a copy of the judgment of conviction or, if such copy is not available, a statement by the Tribunal that the person has been found guilty;

(b) information establishing that the person sought is the person to whom the finding of guilt refers; and

(c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out.

5. If it appears that supplemental information is needed to t4et the requirements of this Article, the United States shall request such supplemental information from the Tribunal. In such a case, any proceedings regarding the surrender may be continued, and the person sought may be detained, for such period as may be necessary to afford the Tribunal a reasonable opportunity to provide the supplemental information requested.

Article 3. Provisional Arrest

1. In case of urgency, the Tribunal may request the provisional arrest of the person sought pending presentation of the request for surrender. A request for provisional arrest may be presented to the Embassy of the United States in the Netherlands or to the Embassy of the United States in another State in which the Tribunal may be situated, or may be transmitted directly by the Prosecutor of the Tribunal to the United States Department of Justice.

2. The application for provisional arrest shall contain:

(a) a description of the person sought and information regarding the probable location of such person;

(b) a brief statement of the essential facts of the

case, Including if possible, the time and location of the offense;

(c) a statement of the existence of a warrant of arrest or a judgment of conviction against the person sought, and a description of the specific violation or violations set forth in the Statute of which the person has been accused or convicted; and

(d) a statement that a request for surrender for the person sought will follow.

3. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest if the United States has not received the formal request for surrender and the supporting documents specified under Article 2 of this Agreement.

4. The fact that the person sought has been discharged from custody pursuant to paragraph 3 of this Article shall not prejudice the subsequent rearrest, and surrender of that person if the surrender request and supporting documents are delivered at a later data.

Article 4. Transit

The United States may authorize transportation through its territory of a person, including a United States citizen, surrendered to the Tribunal by another State. A request by the Tribunal for transit shall be transmitted to the Embassy of the United States in the Netherlands or to the Embassy of the United States in another State in which the Tribunal may be situated or directly to the United States Department of Justice by the Prosecutor of the Tribunal. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.

2. No authorization is required where air transportation is

used and no landing is scheduled on the territory of the United States. If an unscheduled landing occurs on the territory of the United States, the United States may require a request for transit as provided in paragraph 1. The United States shall detain the person to be transported until the request for transit is received and the transit it effected so long as the request it received within 96 hours of the unscheduled landing.

Article 5. Representation and Expenses

1. Where the Tribunal makes a request for surrender of a person, the United States shall as necessary provide assistance and appear in court in connection with such a request.

2. The Tribunal shall bear the expenses related to the translation of documents and the transportation of the person surrendered, unless the Parties agree otherwise. The United States shall pay all other expenses incurred by reason of the surrender proceedings.

Article 6. Entry into Force

This Agreement shall enter into force immediately after the United States has notified the Tribunal that its domestic legal requirements have been met.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Government or international Organization, have signed this Agreement.

DONE at The Hague in duplicate this 24th day of January 1995, in the English language.

FOR THE TRIBUNAL:
/s/ /s/

FOR THE GOVERNMENT
OF THE UNITED STATES OF AMERICA:
/s/

JUDICIAL ASSISTANCE TO THE INTERNATIONAL TRIBUNAL FOR YUGOSLAVIA AND TO THE INTERNATIONAL TRIBUNAL FOR RWANDA.

Pub.L. 104-106 Div. A, Title XIII, §1342, Feb. 10, 1996, 110 Stat. 486, provided that:

"(a) Surrender of Persons.--

"(1) Application of United States extradition laws.-- Except as provided in paragraphs (2) and (3), the provisions of chapter 209 of title 18, United States Code [18 U.S.C.A. §3181 et seq.], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to--

"(A) the International Tribunal for Yugoslavia, pursuant to the Agreement Between the United States and the International Tribunal for Yugoslavia; and

"(B) the International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

"(2) Evidence on hearings.-- For purposes of applying section 3190 of title 18, United States Code [18 U.S.C.A. §3190], in accordance with paragraph (1), the certification referred to in that section may be made by the principal diplomatic or consular officer of the United States resident in such foreign countries where the International Tribunal for Yugoslavia or the International Tribunal for Rwanda may be permanently or temporarily situated.

"(3) Payment of fees and costs.-- (A) The provisions of the Agreement Between the United States and the International Tribunal for Yugoslavia and of the Agreement Between the United States and the International Tribunal for Rwanda shall apply in lieu of the provisions of section 3195 of title 18, United States Code [18 U.S.C.A. §3195], with respect to the payment of expenses arising from the surrender by the United States of a person to the International Tribunal for Yugoslavia

or the International Tribunal for Rwanda, respectively, or from any proceedings in the United States relating to such surrender.

"(B) The authority of subparagraph (A) may be exercised only to the extent and in the amounts provided in advance in appropriations Acts.

"(4) Nonapplicability of the federal rules.-- The Federal Rules of Evidence and the Federal Rules of Criminal Procedure do not apply to proceedings for the surrender of persons to the International Tribunal for Yugoslavia or the International Tribunal for Rwanda.

"(b) Assistance to foreign and international tribunals and to Litigants before such Tribunals. -- [Amends Section 1782(a) of Title 28, Judiciary and Judicial Procedure.].

"(c) Definitions.--For purposes of this section:

"(1) International Tribunal for Yugoslavia.-- The term "International Tribunal for Yugoslavia" means the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, as established by United Nations Security Council Resolution 827 of May 25, 1993.

"(2) International Tribunal for Rwanda. -- The term "International Tribunal for Rwanda" means the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, as established by United Nations Security Council Resolution 955 of November 8, 1994.

"(3) Agreement between the United States and the International Tribunal for Yugoslavia.-- The term "Agreement Between the United States and the International Tribunal for Yugoslavia" means the Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law in the Territory of the Former Yugoslavia, signed at The Hague,

October 5, 1994.

"(4) Agreement between the United States and the International Tribunal for Rwanda. -- The term "Agreement between the United States and the International Tribunal for Rwanda" means the Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, signed at The Hague, January 24, 1995.

Supreme Court, U.S.
FILED
NOV 22 1999
OFFICE OF THE CLERK

No. 99-479

In the Supreme Court of the United States

ELIZAPHAN NTAKIRUTIMANA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Constitution prohibits the United States from authorizing the surrender of individuals for trial in a foreign tribunal through the mechanism of an executive agreement and implementing legislation.

2. Whether the judicial officer in this case properly applied principles of probable cause in authorizing petitioner's surrender.

3. Whether the United Nations Charter authorizes the United Nations Security Council to establish the International Tribunal for Rwanda.

4. Whether the district court, in the exercise of its habeas corpus jurisdiction, should have set aside the order authorizing petitioner's surrender to the Tribunal based on petitioner's assertion that the Tribunal cannot guarantee protection of his due process rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

B. Altman & Co. v. *United States*, 224 U.S. 583 (1912)	13
Baker v. *Carr*, 369 U.S. 186 (1962)	17
Benson v. *McMahon*, 127 U.S. 457 (1888)	13
Bovio v. *United States*, 989 F.2d 255 (7th Cir. 1993)	13
Can v. *United States*, 14 F.3d 160 (2d Cir. 1994)	17
Charlton v. *Kelly*, 229 U.S. 447 (1913)	13, 14
Dames & Moore v. *Regan*, 453 U.S. 654 (1981)	13
De Giacomo, In re, 7 F. Cas. 366 (S.D.N.Y. 1974)	11
Escobedo v. *United States*, 623 F.2d 1098 (5th Cir.), cert. denied, 449 U.S. 1036 (1980)	14
Extradition of Mackin, In re, 668 F.2d 122 (2d Cir. 1981)	7
Extradition of Manzi, In re, 888 F.2d 204 (1st Cir. 1989), cert. denied, 494 U.S. 1017 (1990)	19
Fernandez v. *Phillips*, 268 U.S. 311 (1925)	13
Field v. *Clark*, 143 U.S. 649 (1892)	13
Gerstein v. *Pugh*, 420 U.S. 103 (1975)	13, 14
Glucksman v. *Henkel*, 221 U.S. 508 (1911)	13
Grin v. *Shine*, 187 U.S. 181 (1902)	11, 12
Illinois v. *Gates*, 462 U.S. 213 (1983)	13, 14
Lopez-Smith v. *Hood*, 121 F.3d 1322 (9th Cir. 1997)	13
Neely v. *Henkel*, 180 U.S. 109 (1901)	17

Cases—Continued: Page

Terlinden v. *Ames*, 184 U.S. 270 (1902) 10, 11, 12, 16
United States v. *Lui Kin-Hong*, 110 F.3d 103 (1st Cir.), stay denied, 520 U.S. 1206 (1997) 5, 18
United States v. *Pink*, 315 U.S. 203 (1942) 12-13
United States v. *Stuart*, 489 U.S. 353 (1989) 16
Valentine v. *United States ex rel. Neidecker*, 299 U.S. 5 (1936) 9, 11, 12
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 13

Statutes and regulations:

U.N. Charter, Ch. VII, Res. 955 ..... 2, 3, 15
National Defense Authorization Act for Fiscal Year, 1996, Pub. L. No. 104-106, Div. A, Tit. XIII, 110 Stat. 486:
§ 1342, 110 Stat. 486 2
§ 1342(a), 110 Stat. 486 ..... 3, 4, 9
18 U.S.C. 3181 *et seq.* 2, 3, 4
18 U.S.C. 3181 note (Supp. IV 1998) 3
18 U.S.C. 3184 (Supp. IV 1998) 4, 18

Miscellaneous:

1 Op. Att'y Gen. 509 (1821) 12

In the Supreme Court of the United States

No. 99-479

ELIZAPHAN NTAKIRUTIMANA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 184 F.3d 419. The opinion of the district court denying habeas corpus relief (Pet. App. A40-A42) is unreported. The opinion of the district judge certifying that petitioner is subject to surrender (Pet. App. A43-A112) is unreported, but can be found at 1998 WL 655708. An earlier memorandum and order of a judicial officer denying the first request for certification (Pet. App. A113-A126) is reported at 988 F. Supp. 1038.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1999. The petition for a writ of certiorari was filed on September 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States seeks to surrender applicant to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States (the International Tribunal for Rwanda). The United States has entered into an executive agreement providing for surrender of persons sought by the Tribunal, see Pet. App. A145-A149, and Congress has enacted implementing legislation providing that persons so sought may be surrendered to the Tribunal in accordance with the provisions of 18 U.S.C. 3181 *et seq.*, which prescribes procedures for extradition. See Pub. L. No. 104-106, Div. A, Tit. XIII, § 1342, 110 Stat. 486-487.

1. On April 6, 1994, the President of Rwanda, Juvenal Habyarimana, died in an airplane crash. The crash triggered civil unrest, including attacks primarily by members of the Hutu majority on members of the Tutsi minority, which ultimately led to the deaths of more than 500,000 persons. Pet. App. A2-A3, A76-A77. Acting pursuant to its authority under Chapter VII of the United Nations Charter, the United Nations Security Council adopted Resolution 955, which established the International Tribunal for Rwanda. *Id.* at A127. Resolution 955 provides that member states of the United Nations shall "cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal." *Id.* at A128. The Resolution contains an Annex setting out the Statute of the Tribunal, which

specifies the Tribunal's procedures and defines the offenses subject to its jurisdiction. *Id.* at A129-A144. Article 28 of that Statute specifically directs the member states of the United Nations to surrender or transfer accused individuals to the Tribunal. *Id.* at A143.

The United States participated as a member of the Security Council in the formulation of Resolution 955 and supported its adoption. The United States thereafter entered into an executive agreement with the International Tribunal governing the surrender of persons sought by the Tribunal, Pet. App. A145-A149, and Congress enacted legislation to implement the agreement, *id.* at A150-A152. See Pub. L. No. 104-106, Div. A, Tit. XIII, § 1342, 110 Stat. 486. Section 1342(a), which is set out in the note following 18 U.S.C. 3181 (Supp. IV 1998), provides:

> (a) SURRENDER OF PERSONS
>
> (1) APPLICATION OF UNITED STATES EXTRADITION LAWS—Except as provided in paragraphs (2) and (3), the provisions of chapter 209 of title 18, United States Code [18 U.S.C. 3181 *et seq.*], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to—
>
> (A) the International Tribunal for Yugoslavia, pursuant to the Agreement Between the United States and the International Tribunal for Yugoslavia; and

> (B) the International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

Section 1342(a) of Public Law 104-106 thus directs that the United States shall employ the provisions of the United States Code governing extradition to foreign nations, 18 U.S.C. 3181 *et seq.*, when surrendering individuals to the International Tribunal. Section 3184 (Supp. IV 1998) of those laws provides in pertinent part:

> Whenever there is a treaty or convention for extradition * * *, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, * * * may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for * * * , issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. * * * If, on such hearing, he deems the evidence sufficient * * * he shall certify the same * * * to the Secretary of State, that a warrant may issue * * * for the surrender of such person * * *

Section 3184 accordingly makes clear that, if the International Tribunal submits a request for surrender, the matter is presented to a United States judicial officer. If the judicial officer finds the evidence sufficient to justify surrender, the judicial officer shall so certify that finding to the Secretary of State for her final discretionary determination whether to sign the sur-

render warrant. See, *e.g.*, *United States* v. *Lui Kin-Hong*, 110 F.3d 103, 109-110 (1st Cir.), stay denied, 520 U.S. 1206 (1997).

2. The International Tribunal's prosecutors have discovered evidence that petitioner, a Hutu who was the President of the Seventh Day Adventist Church in Rwanda, participated in two separate episodes of genocide arising out of events at a church complex in Mugonero, Rwanda (the Mugonero Complex) and in the Bisesero region of Rwanda. The prosecutors have prepared two indictments. The Tribunal has separately confirmed each indictment and issued a warrant for petitioner's arrest. See Pet. App. A44-A45.[1]

On June 20, 1996, the Tribunal confirmed the first indictment, which charges petitioner and others (including one of petitioner's sons, who was a doctor at the Complex) with genocide, complicity in genocide, conspiracy, and three separate crimes against humanity (murder of civilians, extermination of civilians, and inhuman acts), in violation of the Statute of the Tribunal. The indictment alleges that, following the death of Rwanda's president, petitioner encouraged fearful Tutsis to take refuge at the Mugonero Complex. There, Hutus were separated out from the assembled persons and encouraged to leave. On April 16, 1994, a convoy of armed attackers, including petitioner, came to the Complex and systematically killed or injured hundreds of Tutsis assembled there. Pet. App. A4-A5.

On September 7, 1996, the Tribunal confirmed a second indictment charging petitioner and his son with

---

[1] Under Tribunal procedures, a prosecutor prepares the indictment and presents it, with supporting materials, to a Tribunal judge. The judge has the responsibility to confirm that the prosecutor established a prima facie case for each count.

genocide, complicity in genocide, conspiracy to commit genocide, and other crimes, all in violation of the Statute of the Tribunal. That indictment describes events that occurred in the Bisesero region of Rwanda. Pet. App. A5. The indictment alleges that, between mid-April and June 1994, petitioner joined convoys of armed soldiers and civilians who repeatedly searched for and attacked Tutsis, including some survivors of the Mugonero massacre, seeking refuge in the Bisesero region.

The International Tribunal's evidence consists of the statements of ten citizen eyewitnesses (summarized by the extradition judge, see Pet. App. A77-A79, A104-A112) who saw petitioner and his son participating in or planning the attacks, and two additional witnesses who saw petitioner's car or the car belonging to his son at the locations of the attacks. Gov't C.A. Br. 30-31. The witnesses knew petitioner personally or were familiar with him because of his position with the church. *Id.* at 7, 30. None of the witnesses received money or other consideration for his evidence. *Ibid.* Their statements described petitioner's participation in the April 16 massacre at the Mugonero Complex. According to the witnesses' testimony, petitioner had encouraged Tutsis to seek refuge at the Complex following the onset of violence. After their arrival, petitioner told Tutsis who sought his protection that the response would come by 9 am (when the massacre began), that they were "condemned to die," and that he could not save them. Petitioner's son, director of the Mugonero Complex hospital, separated Hutu patients, who left the hospital before the attacks began. On the morning of April 16, armed convoys arrived and attacked the Tutsis throughout the day. Witnesses stated that petitioner planned and actively participated in the attack, and one

heard petitioner urge "kill them all." Pet. App. A78, A104-A105, A106, A108, A109, A110-A111; see also Gov't C.A. Br. 8, 30-31.

The evidence also established petitioner's role in activities charged in the second indictment, which had resulted in the deaths of hundreds of Tutsis. Witnesses saw petitioner and his son driving armed attackers to the Bisesero region where Tutsis were hiding. Petitioner provided food and drink to the attackers and instructed them to kill Tutsis. Witnesses saw petitioner carrying a weapon, and one witness reported having seen petitioner personally shooting at Tutsis. Pet. App. A78-A79, A107, A110; Gov't C.A. Br. 8-9, 31. In one incident, petitioner told attacking soldiers to remove the roof of a church in which Tutsis were hiding "so that it cannot be used as a hiding place for the Tutsi 'dogs.'" Pet. App. A79; see *id.* at A107, A110.

3. On October 18, 1996, the United States filed a request on behalf of the International Tribunal for petitioner's surrender to the Tribunal. The magistrate judge denied the surrender request on two grounds. Pet. App. A113-A126. First, he concluded that the statute authorizing surrender to the Tribunal was unconstitutional in the absence of a treaty, reasoning that the surrender of individuals to a foreign power requires a treaty ratified by the President and approved by two-thirds of the Senate. *Id.* at A117- A121. He also found that the Tribunal's request did not establish probable cause. *Id.* at A121-A125.

Because decisions granting or denying certification of extraditability are not appealable, see *In re Extradition of Mackin*, 668 F.2d 122 (2d Cir. 1981), the International Tribunal submitted a renewed surrender request and provided additional evidence of probable cause. See Pet. App. A46-A49. That request added two

new declarations in response to the magistrate judge's concerns about the sufficiency of the evidence. *Id.* at A76. At a surrender hearing conducted by a district judge, petitioner renewed his constitutional objections and again challenged the Tribunal's evidence of probable cause. Petitioner conceded that the evidence on its face was sufficient to establish probable cause to hold him for surrender (June 17, 1998 Tr. 32-33), but he contended that the evidence was not reliable because the witnesses or the translators could have had reasons to fabricate their statements and the translators might not have been competent. See Pet. App. A81-A86.

The district judge considered petitioner's objections at length, Pet. App. A43-A102, and ultimately certified that petitioner was subject to surrender, *id.* at A103. The judge concluded that the Constitution does not require that the United States employ a treaty to surrender a person to a foreign tribunal. The United States can also effect a surrender by means of an executive agreement to which Congress has expressed its assent through implementing legislation. *Id.* at A59-A74. The district judge carefully evaluated the Tribunal's evidence of petitioner's involvement in the charged crimes and petitioner's challenges to that evidence. *Id.* at A75-A86. He concluded that the evidence was sufficient to establish probable cause, *id.* at A86-A98, and he rejected petitioner's speculative challenges that the witness statements and the translations lacked sufficient indicia of reliability, *id.* at A98-A101.

Petitioner sought review of the decision certifying his surrender through a petition for habeas corpus, which is the normal avenue for seeking relief from an order certifying extraditability. The district court denied the habeas corpus petition. Pet. App. A40-A42. Petitioner appealed, and the court of appeals affirmed. It first

rejected petitioner's claim that the Constitution requires that his surrender be effected only by treaty. *Id.* at A7-A13. The court of appeals ruled that the Constitution does not explicitly require a treaty for extradition or require a treaty in lieu of any other form of international agreement. *Id.* at A8, A11-A12. It noted that this Court has stated that the Executive's authority to extradite may derive from a treaty *or* a statute. *Id.* at A8-A10, A12 (citing, *e.g.*, *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936)). The court of appeals additionally ruled that historical practice did not demonstrate that an extradition treaty is constitutionally required, and it rejected petitioner's other constitutional arguments. *Id.* at A12-A13.

The court of appeals also rejected petitioner's contention that the Tribunal's evidence was insufficient to establish probable cause to believe that petitioner committed the charged crimes. Pet. App. A14-A17. It declined to revisit the district judge's credibility findings or his rejection of petitioner's argument that the translators could have been biased or incompetent. *Id.* at A18-A20. The court of appeals also declined to reach petitioner's contentions that the United Nations lacked the authority to establish the Tribunal and that the Tribunal cannot guarantee petitioner a fair trial. *Id.* at A20-A21.[2]

---

[2] A concurring judge expressed his doubts about the persuasiveness of the evidence that the Tribunal had produced to demonstrate petitioner's complicity in the charged crimes and urged the Secretary of State to scrutinize the evidence closely when deciding whether to sign the surrender warrant (Pet. App. A21-A22). The third judge dissented, expressing the view that Pub. L. No. 104-106, Section 1342(a), is unconstitutional (Pet. App. A22-A39).

ARGUMENT

Petitioner seeks this Court's review of four contentions: (1) the Constitution forbids the United States from surrendering an individual to stand trial in a foreign tribunal unless the surrender is accomplished pursuant to a treaty to which the Senate has given its advice and consent (Pet. 4-17); (2) in certifying that petitioner is subject to surrender, the district court employed an incorrect measure of probable cause (Pet. 17-20); (3) the United Nations lacked authority to create the International Tribunal (Pet. 21-26); and (4) the International Tribunal cannot adequately protect petitioner's due process rights (Pet. 26-30). The court of appeals correctly rejected those contentions. Its decision, which is not in conflict with any decision of this Court or another court of appeals, does not present any issue warranting this Court's review.

1. Petitioner contends (Pet. 4-17) that the Constitution bars the United States from surrendering an individual to stand trial in a foreign tribunal unless the United States bases its legal authority to accomplish the surrender on a treaty made by the President with the advice and consent of the Senate. The court of appeals properly rejected that claim. As the court noted, "the power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." Pet. App. A8 (quoting *Terlinden* v. *Ames*, 184 U.S. 270, 289 (1902)). But as that court further explained (*id.* at A8-A11), the United States may also derive its authority to surrender an individual from legislation authorizing that action. See *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5,

9 (1936); *Grin* v. *Shine*, 187 U.S. 181, 191 (1902); *Terlinden*, 184 U.S. at 289.

The Court stated in *Valentine* that the Executive Branch must have legal authorization to exercise the "national power" of extradition, but such authorization can be in the form of a treaty or a statute:

> [T]he constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Valentine, 299 U.S. at 9. Accord *Grin*, 187 U.S. at 191 ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient."); *Terlinden*, 184 U.S. at 289 ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision."); cf. *In re De Giacomo*, 7 F. Cas. 366, 370 (S.D.N.Y. 1874) No. 3747 (Blatchford, J.) ("if there be any want of power to deliver [the fugitive] up, it must be found in a constitutional restriction upon the power to make a treaty, or to pass a statute, covering extradition for a crime previously committed"). Although the Court's decisions in *Valentine*, *Grin*, and *Terlinden* did not involve challenges to legislation authorizing

extradition, the Court's reasoning in those decisions correctly states the controlling legal principle on that subject, and no court of appeals has reached a contrary conclusion. See Pet. App. A59-A74 (decision of the district judge comprehensively discussing the issue).

The court of appeals correctly rejected petitioner's argument that historic practice requires the use of a treaty to surrender individuals to stand trial abroad. See Pet. App. A12-A13. The United States has traditionally employed treaties as a means of providing for extradition, but that practice does not preclude the government from undertaking an executive agreement to be implemented pursuant to a statute as a mechanism for effecting surrender. This Court's decisions in *Valentine*, *Grin*, and *Terlinden* reflect the historical understanding that Congress may authorize surrender through legislation. Indeed, as early as 1821, the Attorney General had expressed the same view. See 1 Op. Att'y Gen. 509, 521 (1821) ("A treaty or an act of Congress might clothe [the President] with the power to arrest and deliver up fugitive criminals from abroad.").

In this case, the President has determined that the United States should assist the International Tribunal in identifying those responsible for committing atrocities in Rwanda, and it has authorized an executive agreement setting out the terms under which such assistance shall be provided. See Pet. App. A145-A149.[3] Congress has expressly endorsed that course of

---

[3] This Court has long upheld the President's power under the Constitution to enter into executive agreements with foreign powers. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 228-230 (1942); *B. Altman & Co.* v. *United States*, 224 U.S. 583, 601 (1912); *Field* v. *Clark*, 143 U.S. 649 (1892).

action through implementing legislation. See *id.* at A150-A152. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

2. Petitioner contends (Pet. 17-20) that the Court should grant review to determine whether judicial officers should evaluate requests for extradition under the same "totality of the circumstances" test for probable cause that judicial officers employ in other law enforcement contexts. See *Illinois* v. *Gates*, 462 U.S. 213, 238-240 (1983); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 120-122 (1975). There is no need for such review, as it is settled that the probable cause standard that the judicial officer applies in extradition proceedings is the same probable cause standard that a judicial officer applies in other contexts. See Pet. App. A14, A75, A86-A87; *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925) (Holmes, J.); *Charlton* v. *Kelly*, 229 U.S. 447, 459-460 (1913); *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911); *Benson* v. *McMahon*, 127 U.S. 457, 462-463 (1888); *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1324 (9th Cir. 1997); *Bovio* v. *United States*, 989 F.2d 255, 258-259 (7th Cir. 1993); *Escobedo* v. *United States*, 623 F.2d 1098, 1102 n.5 (5th Cir.), cert. denied, 449 U.S. 1036 (1980).[4]

---

[4] The district judge noted that, when conducting the probable cause inquiry, judicial officers have not followed a uniform rule

The district judge in this case considered the totality of the circumstances in concluding that there was probable cause to believe that petitioner had committed the charged offenses. See Pet. App. A75-A86. The district judge not only evaluated the evidence that the government offered, *id.* at A75-A80, but he also considered petitioner's challenges to its reliability, *id.* at A80-A86. The district judge concluded that the statements of the witnesses were reliable, noting in particular that the witnesses were ordinary civilians, they were not informants and had not been rewarded for their evidence, their various accounts were generally consistent, and the Tribunal's investigator was able to corroborate many of their statements. See *id.* at A77-A80, A96-A101.

The district judge found no reason to discount the ability or impartiality of the interpreters. He observed that the Tribunal's investigator used the same interpreters, observed their performance during the interviews, and was generally able to converse with witnesses through those interpreters. See Pet. App. A99-

---

respecting the admission of evidence challenging the credibility of the requesting state's witnesses. See Pet. App. A89-A93. There is no "uniform rule" because judicial officers have discretion to consider evidence submitted by the defendant "explaining matters referred to by the witnesses for the Government." *Charlton*, 229 U.S. at 461. This Court's recognition that magistrates have discretion to consider such evidence is consistent with the Court's guidance, in other contexts, respecting the probable cause inquiry. See, *e.g.*, *Gates*, 462 U.S. at 232 ("probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules"); *Gerstein*, 420 U.S. at 120 (noting that probable cause "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof").

A100. Moreover, one of the witnesses who strongly incriminated petitioner gave his statement in French without interpretation. *Ibid.* In light of those circumstances, the district judge was entirely justified in rejecting petitioner's suppositions, without any supporting evidence, that the witnesses lied or that the translators could not be trusted. Instead, he properly concluded that petitioner's "litany of questions and speculations" were issues for cross-examination at the criminal trial. *Id.* at A98-A99. There is no basis for further review of that decision.

3. Petitioner contends (Pet. 21-26) that the United Nations Security Council lacks the authority under the United Nations Charter to establish the International Tribunal. The courts below properly declined to reach that issue. See Pet. App. A20-A21, A101-A102. In any event, there is no merit to petitioner's claim.

We note at the outset that the United States, as a member of the United Nations and a signatory to the Charter, recognizes the Security Council's authority to create the Tribunal. Indeed, the United States, a permanent member of the Security Council, voted to establish it. The United Nations General Assembly, which includes all member states that ratified the Charter setting out the United Nations' authority, similarly signified its agreement that the Security Council has the authority to create the Tribunal by electing the Tribunal's judges and appropriating funds for the Tribunal's operations. See Gov't C.A. Br., Addendum E at 4 & n.14. As this Court has observed, "[t]he practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989).

But more fundamentally, the question whether the United Nations properly exercised its authority in creating the Tribunal is not a matter for the courts to decide. The Executive and Legislative Branches of the United States have clearly accepted the United Nations' authority to create the International Tribunal by virtue of their respective decisions to enter into an executive agreement and implementing legislation facilitating the Tribunal's operation. The district judge properly deferred to that political judgment, finding the issue was beyond the reach of the court. He explained (Pet. App. A101-A102):

> [T]he Court will not engage in this inquiry any more than it would engage in an inquiry of whether a foreign sovereign's courts were properly authorized under its own constitution. See *Terlinden*, 184 U.S. at 289 ("It would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.").

The court of appeals concurred in that judgment. *Id.* at A20-A21. Just as the Executive Branch has authority, to the exclusion of the Judicial Branch, to recognize the territorial and legal sovereignty of a foreign government, the Executive Branch likewise has authority to pass on the legitimacy of a body established by the

United Nations.[5] It would be an unwarranted departure from the Judicial Branch's traditional restraint if the courts attempted to supervise the decisions of the United Nations or to confine the United Nations to what they believe to be its lawful jurisdiction, for such actions would directly interfere with the Executive Branch's conduct of foreign relations.

4. Finally, petitioner contends (Pet. 26-30) that the courts should not have certified his surrender to the Tribunal because, in petitioner's view, the Tribunal cannot protect his fundamental rights. There is no legal or factual basis for that claim.

It has long been established that even "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901). It is also well settled in extradition law that a United States court cannot inquire into the fairness of the requesting state's processes:

> Under the rule of non-inquiry, courts refrain from 'investigating the fairness of a requesting nation's justice system,' and from inquiring 'into the procedures or treatment which await a surrendered fugitive in the requesting country.' The rule of non-inquiry, like extradition procedures generally, is

---

[5] See *Baker* v. *Carr*, 369 U.S. 186, 212 (1962) ("recognition of foreign governments so strongly defies judicial treatment that * * * the judiciary ordinarily follows the executive as to which nation has sovereignty"); *Can* v. *United States*, 14 F.3d 160, 163 (2d Cir. 1994) ("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine, and 'is outside the competence' of courts.") (citing cases).

> shaped by concerns about institutional competence and by notions of separation of powers. It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.

United States v. Lui Kin-Hong, 110 F.3d at 110-111 (citations omitted). Those principles are fully applicable to the International Tribunal, created by the Security Council with the support of the United States, which has requested petitioner's surrender in this case.

As a factual matter, the rights of the accused before the Tribunal, which are explicitly provided in the Statute of the Tribunal (Pet. App. A140-A141), meet international norms (see Gov't C.A. Br., Addendum E at 5) and protect the ability of a person accused by the Tribunal to receive a fair trial. Petitioner alleges that, in fact, the Tribunal is dysfunctional and, because of the political situation in Africa, unable to guarantee the rights set out in the statute. There is nothing in the record to suggest, however, that the Tribunal would be unable or unwilling to afford him a fair trial.

In any event, petitioner's allegations do not provide grounds for a court to deny certification for surrender. The extradition statute, 18 U.S.C. 3184 (Supp. IV 1998), specifies what may be considered in an extradition proceeding, and it does not include such things as the adequacy of the institutions in the requesting forum. As the district court properly found (Pet. App. A102), the issues that petitioner has raised in the judicial forum, including his allegations respecting whether the Tribunal will follow the law or will protect his rights,

are factors to be considered by the Secretary of State as part of her "exclusive power to conduct foreign affairs." *In re Extradition of Manzi*, 888 F.2d 204, 206 (1st Cir. 1989) cert. denied, 494 US. 1017 (1990) (citing cases). Following certification that there is sufficient "evidence of criminality" to warrant surrender, the Secretary of State will review whatever humanitarian claims petitioner may raise and will make a final determination whether surrender is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
SARA CRISCITELLI
Attorney

NOVEMBER 1999

(3)

Supreme Court, U.S.
FILED
DEC 7 1999
OFFICE OF THE CLERK

No. 99-479

In the

Supreme Court of the United States

ELIZAPHAN NTAKIRUTIMANA,

Petitioner,

v.

JANET RENO, as Attorney General
of the United States;
MADELEINE ALBRIGHT, as Secretary
of State of the United States; and
JUAN GARZA, as Sheriff of Webb
County, Texas,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

Ramsey Clark
Counsel of Record

Lawrence W. Schilling
36 East 12th Street
New York, NY 10003
(212) 475-3232

Attorneys for Petitioner

14pp

Table of Contents

1. Extradition Can be Authorized Only By Treaty 1

2. The Failure To Apply The Gates Probable Cause Standard In Extradition Proceedings Merits Certiorari Review 3

3. The U.N. Charter Does Not Confer Power On The Security Council to Create an International Criminal Tribunal 6

4. The ICTR Is Not Able To Assure Fair Trials 8

Table of Authorities

Cases

Bovio v. United States,
989 F.2d 255 (7th Cir. 1993) 3

Charlton v. Kelly,
229 U.S. 447 (1913) 4

Grin v. Shine,
187 U.S. 181 (1902) 1, 2

Illinois v. Gates,
462 U.S. 213 (1983) 3, 4, 5, 6

Lopez-Smith v. Hood,
121 F.3d 1322 (9th Cir. 1997) 3

Terlinden v. Ames,
184 U.S. 270 (1902) 1, 2

Then v. Melendez,
92 F.3d 851 (9th Cir. 1996) 2

Valentine v. U.S.,
299 U.S. 5 (1936) 1, 2

U.S. Constitution

Treaty Clause, Article II . . . . . passim

United Nations

SC Res. 955 1

U.N. Charter . . . . . passim

Other Authorities

National Defense Authorization Act for FY 1996 3

ICTR Internews Reports, November 26, 1999
(www.internews.org) 9

NY Times
November 23, 1999 9

NY Times
December 4, 1999 9

PANA 6-Dec-99 8:25 PM EST 9

Bedjaoui, Mohammed,
The New World Order And The Security Council,
Dortrecht (1994) 8

Dulles, John Foster,
War or Peace, (1950) 8

Higgins, Rosalyn,
The Development of International Law Through
the Political Organs of the United Nations, (1963) 8

1. Extradition Can be Authorized Only By Treaty. The argument of the Federal Respondents ignores the direction of SC Res 955, para. 2 (A-128) that Member nations "...shall take any measures necessary under their domestic law to implement..." its provisions by citing only the provision that Member states shall "...cooperate fully with the International Tribunal..." See Res. Br. at 2. That direction should have informed respondents that the U.S. must enter into a treaty to authorize extradition as it always had done in the past.

Instead, respondents chose to ignore the words of the Treaty Clause and its role in the structure of the Constitution, which either grants exclusive power to the President to enter into agreements with foreign nations with the advice and consent of the Senate in matters regarded as proper subjects of negotiations and treaty at the time, or dangerously divides constitutional power over foreign relations between the legislative and executive branches. Respondents also continue to ignore the debates in the Constitutional Convention and arguments in the Federalist papers urging ratification of the new charter which leave no doubt that the Founders intended as a matter of highest importance to place the treaty making power exclusively in the President with Senate approval.

To justify their claim to power to extradite petitioner in the absence of a treaty, respondents rely on dicta from three cases which they misconstrue.

Terlinden v. Ames, 184 U.S. 270 (1902), Grin v. Shine, 187 U.S. 181 (1902) and Valentine v. U.S., 299 US 5 (1936), all involved and dealt exclusively with extradition treaties. None support the power of Congress to authorize extradition in the absence of a treaty in their holding, or in dicta. All three refer to the power of Congress to implement extradition treaties by legislation. None approved extradition in the absence of a treaty. Valentine was analyzed in petitioner's Reasons for Granting the Writ at pp. 6, 14-16. Terlinden refers once in passing to legislative power to implement a treaty, but never discussed it.

Grin was quoted out of context by respondents at p. 11 of their brief. The preceding sentence approved a general statute, sec. 5270, which eliminated formal treaty requirements

for authenticated copies of warrants of arrest in all treaties. Grin, 187 U.S. at 191.

It was reasoned that eliminating a burdensome treaty requirement *for* a foreign government seeking extradition from the U.S. involving foreign law and procedure that the judiciary could not meaningfully evaluate is within the power of Congress. The Court acknowledged that legislation adding requirements to a treaty could require negotiations of new treaty provisions. Id.

The sentence that follows respondents' quoted dicta notes that sec. 5270, "is applicable to all foreign governments with which we have treaties of extradition." Id.

The Court thus clearly restricted the meaning of the sandwiched sentence quoted by Respondents when read in context to Congressional enactments implementing existing, or future treaties and negates the independent power of Congress to legislate extradition in the absence of a treaty.

Respondents fail to address the discussion and decision of the Court in the first extradition (A119-121), or the lengthy and compelling analysis of the dissent in the Court of Appeals (A22-38) both finding extradition can be authorized only by a Treaty.

Respondents concede that "... Valentine, Grin and Terlinden did not involve challenges to legislation authorizing extradition..." Res.Br. at 11-12. They go on to erroneously claim "... no court of appeals has reached a contrary conclusion," failing to note that no court of appeals has affirmed their unprecedented claims of power to ignore the Treaty Clause. In Then v. Melendez, 92 F.3d 851, 853 (9th Cir. 1996), the Court of Appeals, clearly focusing on the exclusive nature of the Treaty Clause, albeit in dicta, wrote:

> The advice and consent of the Senate is a constitutional prerequisite to a valid treaty, and the executive branch does not have the power to extradite alleged criminals absent a valid extradition treaty.

Respondents seek to read out of the Constitution and the Treaty Clause any exclusive delegation of power in Article II to enter into agreements with foreign governments involving

any subject matter. See, Res.Br. at 13.

It is critically important now that the Court address the role of the Treaty Clause in the Constitutional design, because of the executive claims of power to enter into any contract with foreign governments by executive agreement, or executive agreement with the express, or implied authorization of Congress.

Here, an executive agreement to extradite to an international tribunal was addressed by Congress without committee consideration, committee reports, or committee, or floor debates by floor amendment to the National Defense Authorization Act for FY 1996 and "got slipped into law through the back door, without any public discussion or debate about its substantive merits." DeMoss, CJ, dissenting. A-27.

Could the executive have used this same tactic to seek approval of the Comprehensive Test Ban Treaty which was defeated on the floor of the Senate in October 1999?

2. The Failure To Apply The Gates Probable Cause Standard In Extradition Proceedings Merits Certiorari Review. The government purports to acknowledge that the Gates "totality of the circumstances" standard should control the probable cause determination in extradition cases, see Res.Br. at 13. It sees no need for certiorari review to clarify this standard because "...it is settled that the probable cause standard that the judicial officer applies in extradition proceedings is the same probable cause standard that a judicial officer applies in other contexts...," citing four decisions of this Court, all antedating Gates and three Court of Appeals cases, two decided after Gates, Lopez-Smith v. Hood, 121 F.3d 1322, 1324 (9th Cir. 1997), and Bovio v. United States, 989 F.2d 255, 258-259 (7th Cir. 1993). Neither of these two cases cites Gates or addresses the nature of the probable cause standard in extradition proceedings. Neither provides any basis for the government's facile assurance the standard is "settled." To the contrary, Lopez-Smith, in considering the question whether mental incompetence was a defense to extradition, noted the absence of an analytic framework and

lack of authority despite early decisions of this Court, 121 F.3d at 1325:

> Because Charlton [v. Kelly, 229 U.S. 447 (1913)] and subsequent authority compare an extradition hearing to a preliminary hearing, we have searched for authority on whether a preliminary hearing may result in a decision binding over the defendant, where he is incompetent to assist in his defense. Oddly, despite the frequently repeated proposition that extradition is like a preliminary hearing, neither side has cited any authority, and we have found none, providing an answer to this question. Thus the comparison to a preliminary hearing has turned out to be a blind alley, for purposes of answering the question before us.

In the present case as in virtually all federal extradition proceedings probable cause determinations are being incorrectly made in disregard of the Gates "totality of the circumstances" standard.

The government claims the second extradition officer, who found probable cause after the first had deemed it lacking,[1] "considered the totality of the circumstances" in

---

[1] The government mistakenly asserts that its second request for petitioner's surrender, filed after the first request was rejected, "added two new declarations in response to the magistrate judge's concerns about the sufficiency of the evidence." Res.Br. at 8. In fact, only one new declaration, addressing essentially procedural points, was filed with the second request, by an Assistant Trial Attorney in the Office of the Prosecutor, dated January 26, 1998. A second supplemental declaration, dated May 13, 1998, was later filed by the Investigator whose initial declaration had been held insufficient by the magistrate judge. It was filed not in response to the magistrate judge's concerns, but only after petitioner raised serious questions, which to date have not

making his probable cause determination, Res..Brief at 14.

But it's clear from the District Court's opinion that it neither assessed "the totality of the circumstances" nor thought its determination of probable cause required such an assessment. In assessing probable cause the district court accepted various restrictive rules on "an extraditee's ability to offer evidence" bearing on probable cause, A-89, as for example that a fugitive is not allowed to offer evidence that goes simply to his defense, id., that an extraditee's right to introduce evidence is limited to evidence which explains rather than contradicts the demanding country's proof, id., that what tends to obliterate or negate probable cause may be considered but not what merely contradicts it, A-90, see also A-98, excluding pertinent evidentiary contentions of petitioner on the ground they were not attempts to "explain" the government's evidence, that whether and the extent to which extradition judges may consider challenges to the credibility and reliability

---

been satisfactorily answered, about the bona fides of the Investigator's initial declaration, set forth in part in Appellant's Fifth Circuit Brief at 39-40 and Reply Brief at 23-27. The Investigator was a Dutch police officer the Tribunal employed for six months ending in August 1996, when he returned to Holland. The Tribunal presented no physical or documentary evidence against petitioner -- not even a witness statement -- in support of its two requests. The Tribunal's sole proof against petitioner was the Investigator's initial declaration which purported to present witness statements second and third hand in a narrative by the Investigator. Since the Investigator's declaration was the alpha and omega of the Tribunal's two attempts to show probable cause, its lack of credibility and unreliability as well as the many sources of unreliability in the investigation and interviewing of witnesses are circumstances which should powerfully affect the Gates analysis of probable cause in petitioner's favor and were not adequately taken into account by the district court, which as is discussed infra, mistakenly thought it was required to shy away from considerations of credibility and reliability.

of the government's proof is unclear, A-91, and that challenges to the reliability of translations, if permitted at all, A-94, must not involve substantial inquiry, A-94-95. In applying rules with respect to translations developed in factually dissimilar cases the district court failed to take into account as part of the totality of circumstances the unique and extraordinary background of political, logistical and other factors in this case in which unscreened, unsworn interpreters, all probably Rwandan Tutsis, simultaneously translated both sides of interviews in the field about horrific events occurring three years earlier well-known to the persons being interviewed who were personally affected and involved, in a climate which has remained to date highly politicized, emotional and contentious.

Our research has found only a handful of extradition cases that cite Gates or refer to the "totality of the circumstances" in assessing probable cause. It is the near universal practice in federal extradition proceedings to apply restrictive rules that arbitrarily limit the circumstances that can be considered in assessing probable cause. As a result the federal probable cause standard that should control is being rejected or ignored in virtually all extradition cases. Because the lower courts view this practice as required by decisions of this Court, all of which antedate Gates, the practice will continue unless there is corrective action by this Court.

3. The U.N. Charter Does Not Confer Power On The Security Council to Create an International Criminal Tribunal. The history, structure and text of the Charter, as well as fifty years of practice negate the existence of power in the Security Council to create an international criminal tribunal. Had the Charter contained such power it would never have been approved. The permanent members of the Security Council would have been the first to reject it.

The International Court of Justice with its extremely limited powers to consider disputes among consenting Member nations was established by the Charter and its Statute attached to the Charter. The Statute can be amended only by the same procedures required for amendment of the Charter itself.

The use of a multinational treaty to create the International Criminal Tribunal approved by 122 nations in Rome in July 1998 further evidences the lack of power in the Security Council, save by amendment to the Charter, to create such a Court.

The U.N. Charter is itself a multinational treaty. Respondents have never faced this truth. As a treaty duly ratified pursuant to Article II of the Constitution it is part of the supreme Law of the Land. As part of its law, U.S. courts have no alternative but to determine, insofar as conduct by the U.S. government and rights of persons before them are concerned, whether acts by the U.N. and its organs are authorized by the Charter of the United Nations. Doctrines of abstention, non-inquiry and non-review of political questions, are no more applicable to violations of treaty powers which are part of U.S. law than they are to claims that legislation by Congress, or acts by the Executive exceed their authority under the Constitution and laws of the U.S.

The Charter of the United Nations does not define the U.N. to be a sovereign nation as respondent contends, but an international organization created by means of a multinational treaty to which the U.S. is a party. Analogies to cases in which the U.S. courts have declined to consider whether a foreign sovereign is to be recognized by the U.S., or whether actions of a foreign sovereign conform to its laws are not relevant to the Charter of an international organization which by treaty is part of the supreme Law of the Land.

The importance of judicial review to the integrity of the Constitution of the United States is reinforced by the absence of any recognized legal restraint on actions by the U.N. and its organs. Judicial review by the International Court of Justice of the legality under the U.N. Charter of acts by U.N. organs was rejected during the drafting of the Charter. At the San Francisco conference "the proposal to confer the point of preliminary determination [of each organ's competence] upon the International Court of Justice was rejected. The view was preferred that each organ would interpret its own competence." See, The Development of International Law Through the Political Organs of the United

Nations, Rosalyn Higgins, later a Judge of the ICJ (1963).

John Foster Dulles, in his memoir, War or Peace, in 1950 expressed the view that there are no legal limitations on Security Council power. "The Security Council is not a body that merely enforces agreed law. It is a law unto itself... No principles of law are laid down to guide it, it can decide in accordance with what it thinks is expedient."

This remarkable view is even more remarkably confirmed by Mohammed Bedjaoui, President of the International Court of Justice in his book, The New World Order And The Security Council, Dortrecht (1994). He demonstrates that the Security Council has interpreted its powers as being above the law and beyond any system of legal limits. He writes that whatever the Security Council does is ipso facto legal. He observes that the Security Council has consistently rejected any limits on its powers.

If unchallenged, this concept of unreviewable Security Council power means that the most powerful international organ created by the Charter of the United Nations "to end the scourge of war" is above all laws, domestic and international.

4. The ICTR Is Not Able To Assure Fair Trials. The record amply demonstrates the incapacity of the ad hoc ICTR to provide fair trials, as well as the dysfunctional condition of the Tribunal. The dependancy of the Tribunal on cooperation from the government of Rwanda which controls nearly all witnesses and evidence was once again demonstrated in November 1999 when Rwanda suspended cooperation with the ICTR on November 6 and later refused the Tribunal's prosecutor a visa to enter Rwanda, notwithstanding that the prosecutor had an office in Kigali, Rwanda and the ICTR depends on its ability to obtain witnesses and evidence free from threats, coercion, or interference by the government of Rwanda.

The New York Times reported the action in its opening two paragraphs as follows:

> NAIROBI, Kenya, Nov. 22 – Rwandan officials, angered that charges against a top

> genocide suspect have been dropped, have refused to grant a visa to the prosecutor of the United Nations tribunal investigating the massacres of at least 500,000 people in Rwanda in 1994.
>
> The decision was more evidence of deteriorating relations between the Rwandan government and the tribunal since charges against the suspect, Jean-Bosco Barayagwiza, were dropped early this month. These tensions may make the remaining prosecutions far more difficult. NY Times, November 23, 1999 at p. A9.

Four days later, the Tribunal's Appeals Court suspended for seven days its own order releasing Barayagwiza to provide time for its review. The Tribunal's spokesman said, "I think it is safe to say the last has not been heard in the Barayagwiza affair." ICTR Internews Reports, Nov. 26, 1999 (www. internews.org). If the Court of Appeals affirms its original decision, even the erratic cooperation of Rwanda with the ICTR prosecution may be lost, impairing its ability to secure witnesses and evidence, however unreliable, from Rwanda. If it reverses itself, it will at least appear to have yielded to pressure from the government of Rwanda. The keen interest of the government of Rwanda in convictions by the ICTR is again confirmed.

The government of Rwanda relented on December 3, 1999 and agreed to grant a visa to the prosecutor "... a week after she asked judges to reconsider their decision" to release Barayagwiza. NY Times, Dec. 4, 1999, p. A4. Cooperation with the ICTR by the government of Rwanda remains suspended and Rwandan authorities had not met with the Tribunal's prosecutor as of December 6, 1999, her third day in Kigali. PANA 6-Dec-99 8:25 PM EST. The Tribunal has not yet decided whether to reverse its order. Whatever happens it is safe to say the last dispute between the Rwandan government and the Tribunal has not been heard.

Whatever effect these developments may have on the ability of the ICTR to continue its work, the total inability of

defendants to find and secure witnesses and evidence from within Rwanda remains the same.

The government of Rwanda has simultaneously demanded that the ICTR extradite Barayagwiza to Rwanda. There he would join 120,000 Hutus imprisoned since 1994, nearly all without formal charges. He might also join the several hundred men who have been tried and condemned to death.

Petitioners have shown that the rule of non-inquiry into the legality and procedures of a foreign government relied on by respondents does not apply even in the case of extradition treaties between sovereign nations where fundamental international human rights, or the constitutional rights of a person in U.S. custody cannot, or will not, be protected by the requesting government. See, Petition at 26-30.

To whatever degree rules of non-inquiry may apply to an extradition pursuant to treaty between sovereigns, they can not apply to the surrender of a person in U.S. custody by political officers of the United States to the United Nations pursuant to an executive agreement entered into under the U.N. Charter. As a multinational treaty creating an international organization, the U.N. Charter is part of the supreme Law of the Land. U.S. actions pursuant to U.N. directives which impact directly on the U.S., or persons within the U.S., must assure full protection of U.S. law.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: December 7, 1999

Ramsey Clark
Counsel of Record
Lawrence W. Schilling
36 East 12th Street
New York, NY 10003
(212) 475-3232
Attorneys for Petitioner